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PROTECTING THE CLASS: THE SEARCH FOR THE ADEQUATE REPRESENTATIVE IN CLASS ACTION LITIGATION

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For over 300 years, courts have been troubled by the problem of defining the circumstances that justify the legal determination of the rights of persons not formally joined as parties in litigation. Despite the theoretical and practical problems that are posed by cases where the rights and liabilities of absent parties are resolved, the archetypical suit of this kind—the class action—has flourished in the twentieth century. Our legal system has found many uses for the class action device. Consequently, class actions have become familiar features on the judicial landscape. Yet the proper conditions for litigation on behalf of non-joined groups and non-consenting individuals are debated continually. Due process requires that absent class members be adequately represented, because they are bound by the res judicata effect of the litigation.[1] No problem has proved more perplexing than that of defining "adequate" representation. What qualifies a person who desires to bring a class into being, to represent the group and assert a claim on its behalf?

During the last thirty years, class actions have been used increasingly in civil rights and institutional reform litigation.[2] Frequently, such actions were instituted by persons motivated more by desire to effect social, political, and economic change, than by traditional notions of self-interest. These suits often attacked a variety of practices on behalf of groups whose only common trait was the race or sex of their members. In the late 1960's and 1970's, broadly-based class actions were the staple vehicle for enforcement of the public policies expressed in federal civil rights legislation.[3] The policy justifications for liberal treatment of class actions, combined with the lack of standards for testing a representative's capacity to represent the class,[4] led the courts in that era to avoid addressing the question of representational adequacy, even though such an inquiry was mandated by Rule 23 of the Federal Rules of Civil Procedure (Rule 23).[5] Certification of classes as broad as the plaintiff's attorney's "ingenuity and syntax would allow"[6] became

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1. *See* Hansberry v. Lee, 311 U.S. 32, 44 (1940).
2. *See infra* discussion in text Part II A.
3. *See infra* discussion in text Part II A, II C.
4. *See infra* discussion in text Part I C.
5. *See infra* discussion in text Part I B, I C.
6. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring).

the rule. Whether the plaintiff and counsel could, in fact, protect the interests of absentee class members was not explored in any meaningful way.

As a conservative majority on the Supreme Court asserted itself in the late 1970's and early 1980's, a backlash against liberal class treatment was inevitable.[7] The reaction could have taken the form of a development of standards for representation aimed at the problem of protecting the rights of absentee class members. Unfortunately, the Court chose to ignore the opportunity to articulate a protective standard. It adopted, instead, a narrow and unnecessarily formalistic construction of Rule 23 that is fundamentally inconsistent with the Court's own decisions applying the "case or controversy" requirement of article III in the class action context.[8] This current approach threatens to interfere with the class action's function as a tool for the private enforcement of social policies. Most importantly, the Court's new tack has not advanced the essential inquiry of adequate representation, but instead has inhibited development of a rational approach to the problem in the lower federal courts.[9] It is not too late, however, to begin addressing the question of what constitutes adequate class representation because courts do possess the tools for assessing and insuring adequacy of class representation.[10]

Part I of this article traces the development of concepts of representative adequacy from the English Chancery Court origins of group litigation through the present version of federal Rule 23. Part II describes how the current unhappy state of the law came to pass in the context of civil rights class litigation. Part III outlines and illustrates a procedure for the determination and subsequent monitoring of the representative's protection of class interests. Part IV briefly addresses other proposals for the determination of adequacy.

I. HISTORY AND THE FEDERAL RULES

A. English Practice and the Equity Rules

The origins of the modern class action lie in seventeenth century chancery procedures devised to settle disputes between two groups: agrarian tenants and their landlords, and parishioners and their clergymen.[11] Early group actions were filed by or against cohesive communal groups to enforce or define a custom of the manor or parish. The decisions that resulted from

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7. *See infra* discussion in text Part II C.

8. *See infra* discussion in text Part II B, II C.

9. *See infra* discussion in text Part II D.

10. *See infra* discussion in text Part III.

11. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 157-67, 200-01 (1950); Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 867 (1977) [hereinafter cited as Yeazell, *History of Class Action*]; *cf.* Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U.L. REV. 515, 516-17 (1974) (asserting that although scholars have generally recognized that class actions originated in the seventeenth century, they actually originated in the thirteenth and fourteenth centuries).

these actions had the force of law. For example, tenants frequently sued to determine the amount which the lord of the manor could charge for permitting succession to a tenancy[12] or to fix other obligations running with the land.[13] In a frequently cited case, *Brown v. Vermuden,*[14] a vicar sued his flock to enforce customary tithes. These examples of early group litigation shared a number of distinct characteristics. In the first place, they were filed on behalf of, or against, close-knit groups whose members had expressly consented to being represented in the case by a few of their number.[15] The substantive rights at issue were, by definition, common to all members because of their status in their communities.[16] Due to stare decisis, the effect of the judgment on members of the groups would likely have been the same as if the suits had been filed solely on behalf of the individual plaintiffs.[17] Thus, the procedural device made little, if any, difference in the first class actions.

In a series of seminal articles, Professor Stephen Yeazell has described how, in the eighteenth and early nineteenth centuries, the device created to facilitate resolution of post-feudal agrarian disputes was adopted to address problems created by new social organizations that were the products of the industrial revolution.[18] These new organizations, the forerunners of the publicly-held corporation and the trade union, created problems because they were not considered legal entities.[19] When disputes between these organizations and third parties arose (typically, between organization members and officers accused of malfeasance), the question presented was whether a suit could be filed on behalf of the members forming the organization. The organizations could not sue in their own names without legal status; however, because of the nature of the rights asserted, relief could not be granted to individual members without joinder of all parties who would be affected. According to chancery doctrine, group litigation was impossible without joinder of all parties who would be necessarily affected.

The solution was for the individuals to file suit for themselves and on behalf of the members of the group. These groups, however, bore little,

12. *See* Brown v. Howard, 21 Eng. Rep. 960 (Ch. 1701) (suit to limit fine due on death or alienation); Morgan v. Schudamore, 21 Eng. Rep. 638 (Ch. 1677-1678) determining fine due on renewal of 99-year lease); Farrer v. Duckett, 73 Publ. Selden Soc. 300 (Ch. 1675-1676) (claim of res judicata by prior suits of other tenants).

13. *See generally* Yeazell, *History of Class Action, supra* note 11, at 872 n.30 (discussing group litigation involving members of agricultural communities).

14. 22 Eng. Rep. 802 (Ch. 1676). For a discussion of the *Brown* case, see Z. CHAFEE, *supra* note 11, at 201; Yeazell, *History of Class Action, supra* note 11, at 869-71.

15. *See* Yeazell, *History of Class Action, supra* note 11, at 872 n.30.

16. *Id.* at 873-78, 885-88.

17. *See* Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation,* 27 UCLA L. REV. 514, 517-20 (1980) [hereinafter cited as Yeazell, *Part I*].

18. *See* Yeazell *Part I, supra* note 17; Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation,* 27 UCLA L. REV. 1067 (1980) [hereinafter cited as Yeazell, *Part II*].

19. *See* Yeazell, *Part I, supra* note 17, at 523-33.

if any, resemblance to the cohesive communal families of tenants or parishioners on whose behalf group litigation had been initiated a century earlier. The members of the new groups were typically linked to each other only by their voluntary membership in a society or by their investment in a common enterprise.[20] The differences and distances that separated the members made it impossible to satisfy the existing prerequisite for group actions: the express consent of each member to the filing of such suits. Defendants in group litigation answered complaints by claiming that all members of the group must be joined to commence the suit.[21] But joinder of all class members was impossible for essentially the same reasons that obtaining express consent of all members was not feasible.

To solve the dilemma, chancery courts seized upon the group litigation cases from the previous century. In effect, the chancery courts eliminated the consent requirement simply by stating that unnamed group members on behalf of whom the suit was filed "were in effect parties."[22] In the earlier cases, it could be said that unnamed class members "were in effect parties" because thay had actually consented to the representation, but that justification was inapplicable to the new group cases. Underlying the radical shift away from the consent requirement was an important but wholly unarticulated notion: When a suit was filed for the benefit of absentee group members, the named plaintiff could be treated as the agent for the class. Thus class members were bound by the actions of the named plaintiff. Actual consent was not deemed necessary if the *interests* of the class were adequately represented.[23] Thus, group litigation holdings based on simpler, more cohesive patterns of social organization were distorted to provide a judicial solution to problems unforeseen by the earlier chancellors. For actual consent and cohesion among class members, chancery courts substituted the somewhat vague notion of a presumed common interest shared by group members and their self-appointed representative as the rationale for group litigation.

Just as the English courts appeared to be on the verge of articulating a general theory to justify group litigation by representative parties,[24] the various

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20. *Id.* at 533-35.

21. *Id.* at 535.

22. Chancy v. May, 24 Eng. Rep. 265 (Ch. 1722); *see* Yeazell, *Part I, supra* note 17, at 535-52.

23. *See* Yeazell, *Part I, supra* note 17, at 535-52; *see also* Yeazell, *Part II, supra* note 18, at 1068-69 (while rationalizing the very existence of group litigation, nineteenth century judges developed a theory of litigative representation).

24. A general theory for class litigation was proposed by a nineteenth century scholar, Frederick Calvert:

> [I]f the general rule requires a person to be present, merely as the owner and protector of a certain interest, then the proceedings may take place with an equal prospect of justice, if that interest receives an effective protection from others. It is the interest which the court is considering, and the owner, merely as the guardian of that interest: if then some other persons are present, who with reference to that interest are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be

new associations that had sparked this transformation acquired legal status through legislation. A series of parliamentary acts in the late nineteenth century provided for enforcement of the by-laws of the new organizations, and allowed these organizations to sue and be sued as legal entities.[25] Group litigation was no longer needed to address the problems of the new associations and these cases virtually disappeared from the English reports.[26]

The chancellors never articulated a general theory of representation to justify group litigation. Therefore, nineteenth century American courts and scholars viewed the English precedents as a confusing hodgepodge of cases in which joinder of all interested parties was not required. Justice Storey explained the English cases as examples of equity jurisdiction founded on notions of judicial economy. The "obvious ground" of the English cases was "to suppress useless litigation, and to prevent multiplicity of suits."[27] As Professor Yeazell has demonstrated, however, the English cases, and particularly those spawned in the nineteenth century by the new forms of social and economic organization, almost never served to aggregate numerous individual claims that otherwise would have been filed as separate law suits. Instead, the chancery courts allowed litigation of group claims in circumstances where individual suits by group members would have been impossible.[28] Justice Storey also misread the chancery precedents by assuming that decrees in the group cases had no binding effect on the absent members. He thus perceived the English cases as instances where "the court can proceed to do justice between the parties before it, without disturbing the rights or injuring the interests of the absentee parties, who are entitled to its protection."[29] When the Federal Rules of Equity were enacted in 1843, Justice Storey's distorted view of the English class action precedents was incorporated into Equity Rule 48 (Rule 48), which provided for suit on behalf of a class too numerous for joinder "without manifest inconvenience and oppressive delays in the suit," so long as there were "sufficient parties before [the court] to represent all the adverse interests of the plaintiffs and the defendants in the suit."[30] The rule also stated that class decrees had no binding effect

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required; and the court may, without putting any right in jeopardy, take its usual course, and make a complete decree.

F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 19-20 (1837); *see also* Yeazell, *Part II, supra* note 18, at 1082-85 (the active litigant could sue on behalf of others if the litigant's own self-interest was in a community of interest with theirs); Note, *Developments in the Law—Class Actions,* 89 HARV. L. REV. 1318, 1332-37 (1976) (discussing Calvert's community of interest theory) [hereinafter cited as Note, *Developments*].

25. *See* Yeazell, *Part I, supra* note 17, at 561-62; Yeazell, *Part II, supra* note 18, at 1086-87.

26. *See* Yeazell, *Part II, supra* note 18, at 1086-87.

27. J. STOREY, COMMENTARIES ON EQUITY JURISPRUDENCE 148 (1836).

28. *See supra* text accompanying notes 19-20; *see also* Yeazell, *Part II, supra* note 18, at 1090 (nineteenth century courts required a community of interest but modern courts will aggregate individual complaints to create a lawsuit).

29. J. STOREY, COMMENTARIES ON EQUITY PLEADINGS 95-96 (2d ed. 1840).

30. Equity Rule 48 (Rule 48) provided in full:

Where the parties on either side are very numerous, and cannot, without manifest

on class members not named in the suit. Literal application of this rule would have rendered the class action a mere exception to the indispensible party rule, and would have robbed it of its prime usefulness even under Storey's analysis. If a class member could not be bound by a class decree, multiple suits on the same claim were a likely result.

In fact, that provision of Rule 48, which was plainly intended to insulate unnamed class members from the effects of a decree, was largely ignored by the courts. In *Smith v. Swormstedt,*[31] suit was filed on behalf of some 1500 "travelling and worn out preachers"[32] of the Methodist Episcopal Church South against the Methodist Book Concern, an Ohio corporation. The Book Concern was funded by contributions from the preachers, and the profits from its production of religious books and tracts provided a fund to support disabled and retired preachers and their families. In 1844 the national Methodist Church split into separate organizations over the slavery issue. The Book Concern was controlled by church officials aligned with the Methodist Church North, which refused to recognize the beneficiaries within the jurisdiction of the Methodist Church South. The bill in equity sought a division of the capital of the corporate fund. The bill was objected to on the grounds of a "want of proper parties to maintain the suit."[33] The circuit court dismissed the bill without explanation. The Supreme Court, citing Justice Storey's treatise, but without referring to Rule 48, determined that the action was an appropriate bill. In making this determination the Court stated:

> For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be little danger but that the interest of all will be properly protected and maintained.[34]

> inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule 48, Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli, lvi (1843).

31. 57 U.S. (16 How.) 288 (1853).

32. *Id.* at 298.

33. *Id.* at 302.

34. *Id.* at 303. The Court also stated:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing.

Id.

The Court found the division of the national church to have been authorized by church policy and directed the lower court to divide the capital and assets of the Book Concern between the northern and southern beneficiaries of the fund.[35]

The Court did not explain exactly why there was "little danger" of the interests of the absentees not being protected by the named parties. The class of southern ministers was represented by church officials charged with the duty of prosecuting the suit and by ministers who presumably had a direct financial stake in the matter.[36] The Court also treated the named defendants as representatives of a class of 3800 northern members whose financial interests in the Book Concern were directly jeopardized by the suit. The defendants were agents of the Book Concern and themselves travelling preachers. The apparent rationale underlying the Court's implicit finding that all named parties were proper representatives of their respective classes was the unarticulated premise that those individuals shared a common goal or purpose with the absentees—on the southern side, to obtain a share of the fund, and on the northern side, to maintain the benefits of the Book Concern solely for the northern preachers. Representatives with the same common goal as that of the absent class members presumably would protect the interests of the absent class. Apparently, the Court saw no need to articulate any test or standard by which to determine whether the named parties did share common interests with their represented classes.

In *United States v. Old Settlers,*[37] it was demonstrated that a named party could share a common interest with a represented class without having the same status as absent class members. In *Old Settlers,* the Court, citing *Swormstedt,* allowed "commissioners" purporting to act for an Indian tribe to represent its members in a suit against the government arising under certain treaties. The Court rejected the claim that the commissioners, who were not members of the tribe, could not sue on behalf of the tribe's members. The Court stated:

> [N]otwithstanding the suggestions that these so-called commissioners do not bring themselves as strictly within the rule [of *Swormstedt*] as they should, yet we think that they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment.[38]

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35. *Id.* at 306-09.

36. Three of the named plaintiffs were identified as "commissioners appointed by the Methodist Episcopal Church South, to demand and sue for the proportion belonging to it of certain property, and especially of a fund called the 'Book Concern.' " The other named plaintiffs were members of the class of traveling preachers committed to the Methodist Church South. 57 U.S. (16 How.) at 289.

37. 148 U.S. 427 (1892).

38. *Id.* at 480.

The Supreme Court was not required to address the problem of what qualified a person to represent a group in litigation until well into the twentieth century. The lower federal courts generally had accepted the principle that individuals with interests sufficiently common to those of absent class members could represent and bind them in litigation when parties in interest were sufficiently numerous.[39] These opinions did not purport to explain the principles of adequate representation anymore than *Swormstedt* had. Nor did these decisions explain what criteria a named party had to satisfy in order to qualify as a representative.

One notable exception was an Ohio suit seeking to enjoin striking workers from dissuading non-union labor from entering a plant. In *American Steel & Wire Co. v. Wire Drawers & Die Makers' Unions Nos. 1 & 3*,[40] an unincorporated union, the union president, and some individual workers identified as leaders of the strike were joined as defendants. The circuit court recognized that the unions, as voluntary associations, could not be sued.[41] Nonetheless, the court went on to hold that all the striking workers could be brought before the court by charging "a few persons as the representatives of the many."[42] The rationale behind *American Steel, Swormstedt*, and subsequent cases was that a named party's capacity to represent the class could be established by showing that the posture taken by the named party in the litigation was likely to coincide with the desires of absent class members.

The twentieth century brought with it an increased use, if not a better understanding, of the class action device. Courts and commentators began

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39. *See* Watson v. National Life & Trust Co., 162 F. 7, 8 (8th Cir. 1908) (suit by insurance policyholders against insurer and its successors on behalf of all policyholders similarly situated to enforce contracts); A.R. Barnes & Co. v. Berry, 156 F. 72, 74-75 (C.C.S.D. Ohio 1907) (suit filed by members of trade association on behalf of all members against union officials to enjoin violation of labor agreement); United States v. Coal Dealers Ass'n, 85 F. 252, 260 (C.C.N.D. Cal. 1898) (suit to set aside agreement in restraint of trade among coal dealers filed against unincorporated association and some members "sufficient, under rule requiring sufficient parties, to represent all the adverse interests in the suit."); Bryan v. Stevens, 4 F. Cas. 510, 511 (C.C.S.D.N.Y. 1841) (No. 2066a) (suit to enjoin infringement of patent by some joint holders on behalf of all "co-partners"). *But see* Coann v. Atlanta Cotton Factory Co., 14 F. 4, 8 (C.C.N.D. Ga. 1882) (suit by bondholders for accounting and to require foreclosure of mortgaged property not allowed because Rule 48 expressly reserves rights of absent parties and non-joint bondholders could not be bound by the decree); Baker v. Portland, 2 F. Cas. 472, 474 (C.C.D. Or. 1879) (No. 777) (In suit to enjoin enforcement of state statute prohibiting employment of Chinese labor in certain occupations, "[p]ersons engaged in making street improvements under several and distinct contracts with the city, are not . . . a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole.").

40. 90 F. 598 (C.C.N.D. Ohio 1898).

41. *Id.* at 600.

42. *Id.* at 606. In response to the argument that the named parties were not proper representatives under Rule 48, the court noted:

> [T]he Court can see that those mentioned fairly represent the whole. The fallacy of the objection made is in supposing that the required "representative" capacity

to focus upon basic issues, such as the circumstances that justified class treatment and the binding effect of class decrees.[43] Understandably, the secondary issue of the qualities that rendered the class representative proper was not addressed, except to repeat the often-quoted language of *Swormstedt:* the interests of class members must be represented by those with "common" interests.[44] Even changes in the rules did not result in a markedly improved level of discussion.

In 1912, the Federal Rules of Equity were revised and Rule 48 was replaced by Rule 38.[45] Rule 38, as promulgated by the Supreme Court, simply provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[46] Rule 38 thus specified only two criteria for a class action—numerosity and an issue of "common or general interest" to the class. The failure to include any standard for determining a party's representative status indicated an acceptance of the theory implicit in prior case law: A common purpose or interest shared by the representative and the unnamed class members was sufficient to insure that the absentees' interests would be represented. The issue of representative adequacy was thus subsumed in the question of whether a class existed.

The Supreme Court seemingly confirmed the common interest rationale

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> resides in some official or authorized representative quality, attaching by reason of the action of the union itself in conferring it. As plaintiffs that might be required . . . but as defendants it is not. It depends on the facts in each case, and the court will regulate that matter by its decree, according to circumstances, and will insist that those brought in shall fairly represent the whole, according to the nature of the relief sought and the peculiarities of the association. In a case of an organized strike of laborers it is fair enough if the leaders of the strike be brought in to represent the organization no matter what their official relation to their society may be.

Id. at 607.

43. As late as 1950, Zechariah Chafee commented that the main question concerning class actions was whether the existence of numerous parties with similar claims justified equitable jurisdiction, or whether a traditional basis for equity such as a claim for equitable relief also had to be present. Z. CHAFEE, *supra* note 11, at 149-50; *see also* Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits,* 30 MICH. L. REV. 878, 880 (1932) (the problem is what theory to use to determine whether compulsory joinder of parties in interest, or permissive representative suits for parties with common question, is appropriate).

44. *See* cases cited *supra* note 39.

45. Equity Rule 38 (Rule 38) was promulgated on the recommendation of the bar committee of the Court of Appeals for the Second Circuit. *See* HOPKINS, THE NEW FEDERAL EQUITY RULES 203 (1918). The committee recommended the omission of the last sentence of Rule 48 because, "in every true 'class suit' the decree is necessarily binding upon all parties included in the decree." *Id.* Professor Yeazell has speculated that the court adopted the new rule to save itself "the embarrassment of promulgating a rule whose inaccuracy could be demonstrated by its own leading opinion [*Swormstedt*] on the question." Yeazell, *Part II, supra* note 18, at 1096 n.158.

46. Rule 38, Rules of Practice For the Courts of Equity of the United States, 226 U.S. 629, 659 (1912).

In sum, during the first half of the twentieth century, the class suit became an accepted, if not well understood, device for resolution of issues common to groups of persons too numerous to join individually as parties. What constituted a question of general or common interest within Rule 38 or equivalent state rules remained a source of significant debate. Some courts restricted class actions to situations in which class members shared an interest in the subject matter of the suit.[55] Other courts were willing to entertain actions on behalf of groups possessing a common interest in having an issue of law decided in a particular way and seeking a form of relief common to all.[56] In any case, once it was determined that a sufficiently common interest existed to allow a class action under the rule, relatively little attention was paid to the representative status of a named party. It was generally accepted that standing to represent a class was established by some showing that the representative's interest in the litigation was compatible with the interests of those the representative would represent.[57] Rarely were the class representative's interests found to be insufficiently aligned with those of the

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Brief for Appellant at 19, *Ben-Hur,* 255 U.S. 356 (1921). Professor Chafee, commenting on the decision, noted the following:

> It is a cardinal principle of such class suits that the omitted members must be interested in the subject matter of controversy in the same way as their representatives. . . . This cardinal principle of class suits has frequently been expressed as requiring that the subject matter of the suit must be in the nature of a "general right."

Z. CHAFEE, *supra* note 11, at 164-65.

55. *See* Ohio v. Cox, 257 F. 334, 338-39 (S.D. Ohio 1919) (suit to enjoin Governor from transmitting to general assembly the proposed eighteenth amendment to the federal constitution requiring universal prohibition was not a proper class action under Rule 38 because the common interest was not in property, but in matters "personal and intangible in . . . nature, having to do with political rights"). The prior Supreme Court cases, *Swormstedt* and *Ben-Hur,* were not inconsistent with this theory because both involved claims of common interest in property. This subject matter approach to the common interest issue resulted in the denial of class treatment in situations where it would be considered particularly appropriate by modern standards. For example, in Raich v. Truax, 219 F. 273 (D. Ariz. 1915), *aff'd on other grounds,* 239 U.S. 33 (1913), a suit was filed by a foreign national to enjoin enforcement of a state law requiring employers to hire no less than 80% citizens of the United States. The suit was filed as a class action under Rule 38, but was determined not to be suitable for class treatment because the rule did not justify judicial intervention for injuries to others. 219 F. at 283.

56. *See* Gramling v. Maxwell, 52 F.2d 256, 263 (W.D.N.C. 1931) (over 100 out-of-state truck farmers had common interest in avoiding tax); Chew v. First Presbyterian Church, 237 F. 219, 232-33 (D. Del. 1916) (owners of cemetary plots have common interest in preventing sale by church); Merchants' & Mfrs.' Traffic Ass'n v. United States, 231 F. 292, 294 (N.D. Cal. 1915) (ICC regulation permitted joinder of all interested and affected parties).

57. In McArthur v. Scott, 113 U.S. 340 (1884), a will contest in which heirs "whose interest it was to set aside the will in fact controlled both sides of the controversy," the Court ruled that those appearing as representatives of residuary legatees must not in fact be antagonistic toward the interests of those represented. *Id.* at 394-95. Though not a class action, *McArthur* was cited for the same proposition in class suits. *See In re* Dennett, 221 F. 350, 355 (9th Cir. 1915) (stockholders derivative suit to return assets to loan association).

in 1921. In *Supreme Tribe of Ben-Hur v. Cauble*,[47] the Court was presented with a suit by a fraternal benefit organization to enjoin a class action by disgruntled policyholders on the ground that the policyholders' rights had been adjudicated in an earlier class action.[48] The original suit was a federal diversity action that resulted in a final decree upholding the Tribe's reorganizational plan, which reduced benefits to some members. The second suit was filed in state court, and attacked the same reorganizational plan. The Court ruled in favor of the Tribe,[49] reasoning that if federal courts were to have jurisdiction in class actions, the decree in such cases must bind all of the class "properly represented."[50] The Court then concluded, without elaboration, that "[t]he parties bringing the suit truly represented the interested class."[51] The actual performance of the named plaintiffs was considered irrelevant to their representative status. The fact that no appeal was taken from the adverse decree in the original case[52] was not discussed, nor was there any indication that class members in the second suit acquiesced in the original plaintiffs' representation, or even had notice of the suit.[53] The Court plainly assumed that the class was "truly represented" because the plaintiffs in the first case had sought to achieve the goal presumably shared by all class members in the litigation.[54]

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47. 255 U.S. 356 (1921).

48. *Ben-Hur* began in 1913 when some 500 unhappy policyholders of the Supreme Tribe of Ben-Hur, an organization based in Indiana, sued the organization to challenge a reorganization which provided them and other holders of the same type of policy with less favorable benefits than those they had previously enjoyed. The suit was filed in federal court in Indiana as a class action on behalf of all holders of the same class of policy held by the named plaintiffs. *Ben-Hur*, 264 F. 247, 248 (D. Ind. 1920). All the named plaintiffs were residents of states other than Indiana; thus, jurisdiction was based on diversity of citizenship. *Id.*

The case was tried and a final decree was rendered which validated the reorganizational plan. *Id.* Some five years later, Amelia Cauble, an Indiana policyholder, filed a class action in state court on behalf of Indiana policyholders, attacking the same reorganizational plan that had been approved in the earlier federal action. To avoid relitigation of an issue it had already won, the organization sought an injunction in federal court ancillary to the former decree, prohibiting the state court plaintiffs from continuing prosecution of the suit. *Id.* The federal district court dismissed the bill on the ground that the Indiana policyholders could not have been bound by the earlier federal decree because their membership in the plaintiffs' class would have destroyed diversity. *Id.* at 249.

49. 255 U.S. at 366.

50. *Id.* at 367. Ironically, in light of its prior disregard of the qualifying language of Rule 48, the Court found the change in Rule 38 to be "significant." *Id.* at 366.

51. *Id.* at 367.

52. *Id.* at 361.

53. Although the class was composed of more than 20,000 policyholders, none intervened in the original case. *Id.*

54. In its brief to the Supreme Court, the Tribe argued that the original plaintiffs' prosecution of the case itself was evidence of common interest binding them to other class members:

> The cause was brought and tried in good faith, and a decree resulted, after actual litigation, dismissing the bill for want of equity. It is this common interest which constitutes the bond of union essential to the maintenance of such a class suit, and when it exists, the decree binds the entire class by representation; especially when the subject-matter of the suit is common to all.

class.[58] Although the class representative was normally a member of the class,[59] no firm rule was established in this regard. Courts found officers of unincorporated associations[60] or specially selected trustees[61] to be appropriate class representatives. The question of how well the representative party protected the class interest in the litigation was simply not considered prior to the enactment of the Federal Rules of Civil Procedure.

B. Federal Rule 23: Adequacy Appears Undefined

The promulgation of the Federal Rules of Civil Procedure was a watershed in the history of American class actions. The preliminary draft of the rules submitted to the Supreme Court in 1936 contained no separate rule on the subject of class actions.[62] Instead, class action provisions were included in the rules on compulsory and permissive joinder. These provisions, although worded somewhat differently from Rule 38, in effect constituted a restatement of that rule.[63] The final version of the rules enacted in 1937, however, did contain a separate provision on class actions, Rule 23 of the Federal Rules of Civil Procedure.[64]

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58. One notable exception is Fischer-Schein Syndicate v. Lee, 295 F. 485 (7th Cir. 1924), a class action on behalf of security holders in a real estate syndicate to dissolve the organization and distribute the capital. The district court entered a restraining order and appointed a receiver. *Id.* at 487. On appeal, the Seventh Circuit reversed, in part because "the record shows that a great majority of the certificate holders regard their interests as wholly opposed to those of appellee." *Id.* at 488. A much more common ground for striking class actions was faulty pleading of the class claim. *See* Wabash R.R. v. Adelbert College, 208 U.S. 38, 58 (1908) (an allegation that suit brought on behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join); Ball v. Bank of Bay Biscayne, 43 F.2d 214, 217 (S.D. Fla. 1930).

59. *See, e.g.*, Helm v. Zarecor, 213 F. 648, 649-50 (M.D. Tenn. 1913) (three ministers appointed by Presbyterian church could bring pension suit on behalf of all); United States v. Coal Dealers' Ass'n, 85 F. 252, 260 (C.C.N.D. Cal. 1898) (anti-monopoly suit against an "unlawful combination" filed against representative members).

60. *See, e.g.*, Evenson v. Spaulding, 150 F. 517, 522-23 (9th Cir. 1907) (association of local hardware dealers adequately represented by original organizers).

61. *See, e.g.*, Winton v. Amos, 255 U.S. 373, 392 (1921) (representative of class of Choctaw Indians appointed by Congress "by analogy to the familiar practice in equity, recognized in Equity Rule 38"); United States v. Old Settlers, 148 U.S. 427, 428 (1892) (Cherokee nation appointed "commissioners" to represent tribe in treaty suit).

62. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570 (1937).

63. Instead of providing, as did Rule 38, that the class be linked by a "common" question, the preliminary draft called for class treatment where proper, necessary, or indispensable parties were too numerous to all be joined as parties. *See* Moore, *supra* note 62, at 570-71.

64. Subsection (a) of Federal Rule of Civil Procedure 23 (Rule 23) provided:

> **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary

Rule 23 constituted a break from its predecessors both in format and underlying philosophy despite its description by the advisory committee as a "substantial restatement of Equity Rule 38."[65] The rule was principally the creation of Professor J. W. Moore, who served on the reporter's staff for the advisory committee.[66] In Moore's view, the "common or general interest" standard employed in the equity rules provided insufficient guidance with respect to determining the kinds of cases appropriate for class treatment.[67] Rule 23 was designed to pigeonhole class actions into three categories distinguished from each other by "the character of the rights" to be adjudicated for or against the class.[68] These categories, referred to as "true, hybrid, and spurious"[69] encompassed the kinds of cases that, in Moore's view, historically had been given class status.[70] Moore's classification scheme was also intended to differentiate between the categories of class

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right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Fed. R. Civ. P. 23(a) (1937), *amended by* FED. R. CIV. P. 23(a) (1966). Subsection (b) specified a number of pleading requirements for stockholders' derivative actions. Subsection (c) prohibited settlement or voluntary dismissal of a class action without court approval and required notice to absentees of any proposed dismissal or compromise of a "true" class action.

65. Fed. R. Civ. P. 23 advisory committee note (1937), *quoted in* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.01[1-2], at 23-15 (1982).

66. The extent of Professor Moore's influence can be gauged by comparing his suggested alternative to the preliminary draft with Rule 23 as subsequently enacted. Except for insignificant differences in choice of words, Rule 23(c) precisely tracks Moore's draft. *See* Moore, *supra* note 62, at 571.

67. *Id.*

68. Professor Moore described the classifications of actions as "dependent upon the jural relationships of the members of the class." Moore & Cohn, *Federal Class Actions,* 32 ILL. L. REV. 307, 314 (1937).

69. *See* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.08-.10, at 23-2505 to -2610 app.; Moore & Cohn, *supra* note 68, at 314-21.

70. True class actions under Rule 23(a)(1) were those in which the rights asserted were "joint," "common," or "secondary" (derivative) and included all cases in which, but for the class device, joinder of all class members would be required. 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.08, at 23-2505 app. In this group fell cases like *Swormstedt* and *Ben-Hur*, which were considered examples of actions to enforce rights held in common. *See* Moore & Cohn, *supra* note 68, at 316. Moore considered "joint" rights to cover suits by or against representatives of unincorporated associations. *See* Moore, *supra* note 62, at 572-73. Secondary or derivative rights were those enforced by shareholders in stockholder derivative actions. *Id.*

The hybrid class action under Rule 23(a)(2) was described as an action in which numerous individual claimants sought to enforce their separate rights against a common fund or specific property, exemplified by the creditor's action to force a receivership. Fed. R. Civ. P. 23 original advisory committee note, *quoted in* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.01[2], at 23-16. This kind of class action was thought to be of little importance because the passage of the federal bankruptcy statutes "diminished the importance of the equity receivership as a means of liquidation." Moore & Cohn, *supra* note 68, at 317 n.83.

actions based on the binding effect of the particular action on absent class members.[71] A judgment in a true class action was to bind the entire class; in hybrid actions, it would bind the named parties and those absentees with claims on property involved in the case. In contrast, the spurious action would bind only those persons actually joined in the suit. The "spurious" action was thus a permissive joinder device described by Moore as "an invitation to joinder—an invitation to become a fellow traveller in the litigation, which might or might not be accepted."[72] It is worth noting that Justice Storey's notion of the class action as a vehicle of judicial economy had been lost in the shuffle. True class actions were by their nature cases that, because joinder of indispensible parties was impossible, could not be litigated without the class device. Spurious actions, on the other hand, would not necessarily result in the aggregation of separate claims because no party was bound unless that party voluntarily intervened. Hybrid actions were considered relatively useless, even by Moore.[73]

The now infamous classification scheme was not the only aspect of Rule 23 that set it apart from its predecessors. Even though the draftsmen may have intended to restate the elements of Rule 38 in the preamble to Rule 23(a), they added language that had no counterpart in the old rule. Rule 23(a) provided that where the class was too numerous for joinder, "one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued" when the "character of the right" asserted fits within one of the designated classifications.[74] Neither Professor Moore nor the advisory committee, however, provided any clue as to why, for the

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The third category, spurious class actions, encompassed suits involving claims which were "several," meaning that the claims were linked by common questions of law or fact. *See* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.10, at 23-2601 to -2602 app. Class members could file individual actions under Rule 23(a)(3) without running afoul of the joinder rules so long as "common relief" was sought for the class. *Id.* An example of this type of action is a suit to enjoin the collection of illegal taxes. Professor Moore considered the spurious action applicable to cases arising from mass torts. Moore & Cohn, *supra* note 68, at 318.

71. In his proposed rule, Moore included a separate subsection entitled "Effect of Judgment" which specified the res judicata effects of each of the three kinds of class actions. Moore, *supra* note 62, at 571. The advisory committee refused to incorporate Moore's "Effect of Judgment" provision into Rule 23, but as the advisory committee had accepted Moore's scheme of classification for class actions, Moore's views as to the attributes of each of the three categories was highly influential. Chafee noted that:

> Nowise discouraged at being locked out at the front door, Mr. Moore was soon to slip in by the back door. The same differentiated consequences which his tentative draft wanted to give by rule of court . . . are now attributed to each of those groups in Moore on *Federal Practice* as a matter of sound doctrine and case law. So great in the deserved respect for his treatise, that his scheme about binding outsiders had almost as much influence on judges as if it has been embodied in Rule 23.

Z. CHAFEE, *supra* note 11, at 251.

72. Moore, *supra* note 62, at 574-76.

73. *See supra* note 70.

74. *See supra* note 64 for the text of Rule 23(a).

first time, the "adequacy of representation" language was inserted into the rule.[75] Whatever the reason, the Supreme Court provided a context for the application of new language shortly after the rules went into effect.

Hansberry v. Lee[76] arose from a collateral attack on a judgment said to be binding on the litigants as unnamed members of the class on whose behalf an earlier suit was filed. The earlier case, *Burke v. Kleinman,*[77] was an action brought to enforce a racially restrictive covenant.[78] A class action was filed on behalf of property owners in a Chicago residential area against a resident who had allegedly rented an apartment to a black man. The covenant by its terms was effective only if signed by 95% of the area's property owners. The case was not tried, but was submitted on an agreed statement of facts, including a stipulation that the covenant had been signed by the required percentage of owners. An injunction was entered enforcing the covenant and was affirmed on appeal.[79] Several years later, the *Hansberry* action was filed[80] to enjoin the sale of a house to a black family. The principal defense in *Hansberry* was that the covenant had not been signed by the requisite percentage of property owners. The trial judge found that only 54% of owners had signed the covenant; however, he held for the plaintiff on the ground that the defendants and their predecessors in interest were members of the *Burke* class and were thus bound by the prior judgment that the covenant was valid.[81] The Illinois Supreme Court affirmed, noting only that "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs other members are bound by the results in the case. . . ."[82]

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75. In an article published the same year that the federal rules were promulgated, Moore commented, without citation to authority, that "in all [class] cases sufficient facts must be alleged to satisfy the court of the sincerity of the representation." Moore & Cohn, *supra* note 68, at 313. Although the advisory committee in its note briefly discussed the "common or general interest" requirement, the committee failed to even mention the "adequate representation" requisite of the rule. Fed. R. Civ. P. 23 advisory committee note (1937), *quoted in* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.01[1-2], at 23-15 (1982).

76. 311 U.S. 32 (1940). *Ben-Hur* arose in similar circumstances. *See supra* notes 47-54 and accompanying text.

77. 277 Ill. App. 519 (1934).

78. The covenant provided that no part of the property restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January, 1948. *Id.* at 520.

79. *Id.* at 522. The only issue litigated was whether by reason of changes in the area, the covenant could not be enforced in equity. *Id.* at 531. Defendants did not contend that the covenant was against public policy or that its enforcement violated their federal constitutional rights. *Id.* at 533-34.

80. Lee v. Hansberry, 372 Ill. 369, 24 N.E.2d 37 (1939).

81. *Id.* at 372, 24 N.E.2d at 38.

82. *Id.* at 373, 24 N.E.2d at 39. Justice Shaw, joined by Justice Murphy, dissented on two grounds. *Id.* at 376, 24 N.E.2d at 41 (Shaw, J., dissenting). First, he noted that the judgment in *Burke* had been procured by a fraudulent representation that the restrictive agreement had been signed by the requisite number of property owners to make it effective. *Id.* at 377, 24 N.E.2d at 41 (Shaw, J., dissenting). Second, he found that no class existed. Justice Shaw

The United States Supreme Court reversed the Illinois Supreme Court's decision in *Hansberry,* finding that it would be inconsistent with due process to bind non-joined class members unless the state insured "that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."[83] Plainly, neither requirement was satisfied in *Hansberry:* the pro-covenant owners did not have a common interest with the anti-covenant owners,[84] nor had the latter class's interests been protected by the vigorous advocacy of the defendants in *Burke.* Though the Court in *Hansberry* did not specify what procedures could have been employed to avoid the due process problems in *Burke,* the Court did articulate two constitutionally-based requirements for an "adequate" class representative. The first requirement was a formal standing rule: The representative should have a position or purpose similar to those of the class.[85] The second requirement was a practical one: The

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felt that even if the covenant had been properly executed, it could not be enforced through a class action. Justice Shaw stated:

> In the case before us, each property owner held and owned his property in severalty. He might or might not wish the covenant enforced. He might or might not wish to contest its validity. He might or might not wish to sell, lease or mortgage his property without regard to it. On any of these questions, his next door neighbor or any other property owner in the district might disagree with him. There could be no certainty nor even any probability that they would all agree on a course of conduct to be followed at any particular time or under any particular circumstances. There was no common right nor any common fund, nor any common or undivided res to be dealt with, and certainly no one ever had any right or power to speak for any one but himself.

Id. at 377, 24 N.E.2d at 42 (Shaw, J., dissenting).

83. 311 U.S. at 43.

84. As the *Hansberry* Court explained, "[t]hose who sought to secure [the benefits of the covenant] by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance. . . ." *Id.* at 44. Therefore, "a selection of representatives for the purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45.

Commentators analyzing *Hansberry* have suggested that notice to the class members of the suit's pendency would have satisfied the requirements of due process and then the judgment rendered would have been binding on absent class members. "[T]he fundamental reason why the Supreme Court of Illinois was reversed in the *Hansberry* case—though imperfectly expressed—was that the lack of notice to all members of the class in *Burke* precluded the decree in that suit from binding the entire class." Keeffe, Levy & Donovan, *Lee Defeats Ben Hur,* 33 CORNELL L.Q. 327, 338-39 (1948). What these authors did not make clear, however, was how such notice would have solved the adequate representation problem upon which the Supreme Court focused. They may have assumed that class members who did nothing after receiving notice would have consented to their inclusion in the class and to representation by *Burke.*

85. Professor Yeazell has criticized the language of the *Hansberry* opinion as suggesting that the validity of a class depends on the subjective desires of the class members, thus rendering a class definition and representation impossible without individual acquiescence by class members. *See* Yeazell, *Part II, supra* note 18, at 1103-07. This may be too broad a reading of the decision. A more reasonable interpretation is that the Court found, in the context of *Burke,* that it was error to treat all property owners as a class. The circumstances of the case

representative must in fact seek to achieve the class's goal in the litigation.[86]

The enactment of Rule 23 was followed by a dramatic increase in the number of suits filed as class actions.[87] Whether the increased use of what formerly had been a procedural oddity resulted from the attention drawn to the device by the new language of Rule 23 and the spate of writing concerning it, is not clear.[88] It is undeniable, however, that the decades following passage of Rule 23 witnessed a rapid expansion in the use of class suits to enforce rights arising under the security and antitrust laws, and in other areas where class litigation had been virtually unknown before 1938.[89] This

showed that at least some land owners did not wish the restrictive covenant to be enforced. Thus, the class of land owners who had signed the agreement could be presumed to desire its enforcement. Even assuming a collusive stipulation as to the number of signers, any such class definition would not have bound property owners or their successors who had not signed the agreement. There is nothing in the opinion to suggest that the Supreme Court was rejecting the idea that under some circumstances a common interest could be rationally presumed. Indeed, the Court relied on *Swormstedt* and *Ben-Hur,* cases in which such presumptions were made. What could *not* be presumed in *Burke* was that all land owners wished to exclude blacks from the area. But it would certainly not have been unreasonable to presume that the 54% of the land owners who did sign the agreement wanted it enforced and constituted a proper class.

86. The *Hansberry* Court noted that no party in *Burke* had contested vigorously the validity of the covenant. The defendants were only "nominal" and their "interest in defeating the contract outweighed their interest in establishing its validity." *Hansberry,* 311 U.S. at 46. The trial judge had determined that the judgment in *Burke* was procured by fraud and collusion between the parties. 372 Ill. at 377, 24 N.E.2d at 41 (Shaw, J., dissenting). There was apparently much evidence to support that finding. The suit had been instigated by a property owners' association for the purpose of obtaining a judicial decree that the covenant was binding. An officer of the association, who was responsible for obtaining signatures to the restrictive agreement, provided an affidavit stating that at the time *Burke* was filed he and other officials of the organization knew that 95% of the owners had not signed. *Id.* at 372, 24 N.E.2d at 38. The president of the association was the husband of the plaintiff, Olive Burke. *Id.* at 374, 24 N.E.2d at 39. Burke subsequently withdrew from the association "with ill feelings and stated several times that he would put negroes in every block of that property." *Id.* at 374, 24 N.E.2d at 39-40. Burke was a defendant in *Hansberry,* having allegedly participated in the purchase of the property in question and in the concealment of the plan to transfer it to a black family. *Id.* at 374, 24 N.E.2d at 38. Despite this record, the Illinois Supreme Court held that there was "no evidence of fraud or collusion" apparently because there was no direct proof that the stipulation in *Burke* was procured by collusion. *Id.* at 374, 24 N.E.2d at 39.

87. The Federal Digest, classifying cases from 1754 through 1938, reported that 12 cases had been brought as class actions under the "Equity 97" heading. *See* 29 FED. DIG. 231-32 (1940). In contrast, its successor, the Modern Federal Practice Digest reported 204 cases under the topic "Class Actions" for the period 1938 through 1959. *See* 22 MOD. FED. PRAC. DIG. 167-212 (1960).

88. Professor Chafee suggested that the flood of new class cases could be attributed to the writings of Professor Moore and other authors that "directed the attention of American lawyers to a hitherto unfamiliar procedural device" and to passage of the Fair Labor Standards Act, 29 U.S.C. § 216 (1938), which authorized class actions for unpaid minimum wages by employer on behalf of others "similarly situated." Z. CHAFEE, *supra* note 11, at 199.

89. In 1950 Professor Chafee complained that,

> class suits came rushing at us from all directions, not only in old-fashioned areas of business and insurance law but in litigation under the Securities Exchange Act, in claims for private injuries covered by monopolistic violations of the anti-trust laws, in claims for overtime pay, in attacks on the validity of patents, and so on,

new wave of litigation was distinguished not only by the sheer volume of cases and the increased complexity of the claims, but also by increased judicial attention to the relation between the named party and the class the named party purported to represent.

Three problems concerning class representatives confronted the courts after *Hansberry:* the problem of determining what constituted a common interest between representatives and class members; the problem of insuring vigorous advocacy of class interests; and the problem of defining the relation between notice to absentees and representative adequacy. Of these, the attempts to determine what constituted a common interest resulted in the widest divergence of opinions, particularly with respect to spurious class actions.

Rule 23(a)(3) defined the spurious class as a group of persons whose rights hinged on "a common question of law or fact" and on whose behalf or against whom "common relief was sought."[90] But because the rule did not specify the degree of commonality required, the courts were provided with no objective test to determine whether a class existed and, for the same reason, whether the representative had standing to represent the class.[91] The courts generally applied Moore's vague standard which required that "the representative must have an interest, which is co-extensive and wholly compatible with the interests of those whom he would represent."[92] But this standard added little to the notion that a class representative could not have

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> with no breathing spell in sight. The facts of the older class-suits cases seem very simple in contrast with the enormous complications of these recent litigations, when it is often difficult to see just what was described. All sorts of new problems arise, among which the judges are groping.

Z. CHAFEE, *supra* note 11, at 200.

90. For the text of Rule 23(a), see *supra* note 64.

91. The preamble of Rule 23 implied that the class representative must be a member of the class he or she represents. *See* Rock Drilling Union v. Mason & Hanger Co., 217 F.2d 687, 693 (2d Cir. 1954) (labor union can represent members in contract suit but not in tort), *cert. denied,* 349 U.S. 915 (1955); Johnson v. Crawfis, 128 F. Supp. 230, 240 (E.D. Ark. 1955) (negro child denied admission to state hospital is without standing to challenge segregation of patients); Fitzgerald v. Kriss, 10 F.R.D. 51, 55 (N.D.N.Y. 1950) (national union cannot represent local union in unfair competition suit against other local). But, in most cases, the class could be defined to include even a representative with quite divergent interests from those of the absentee class members. Courts, however, uniformly held that a plaintiff could not create representative status merely by pleading that the case was a class action, without ever explaining exactly what the party seeking class status had to show to satisfy Rule 23. *See* Oppenheimer v. F.J. Young & Co., 3 F.R.D. 220, 224 (S.D.N.Y. 1943) (bondholders charging conspiracy to defraud had burden of proof of adequate representation); Pacific Fire Ins. Co. v. Reiner, 45 F. Supp. 703, 708 (E.D. La. 1942) (joinder of one owner of single pawned item destroyed by fire not sufficient when class numbers over 5000).

92. 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.03, at 23-105 to -110; *see also* Brotherhood of Locomotive Firemen & Enginemen v. Graham, 175 F.2d 802, 807 (D.C. Cir. 1948) (two individuals did not have identical interest with the union and several railroads in suit for racial discrimination); P.W. Husserl, Inc., v. Newman, 25 F.R.D. 264 (S.D.N.Y. 1960) (intervention by 40 plaintiffs in antitrust suit against dress-pattern maker shows co-extensive interest); United States v. E.I. DuPont deNemours & Co., 13 F.R.D. 98, 101 (N.D. Ill. 1952) (members of DuPont family do not have identical interests in defending monopoly suit).

interests antagonistic to those of the class. In cases like *Hansberry,* where there were sharp differences in interest between the purported class members with respect to the goal of the suit, courts had little difficulty in denying class treatment.[93] The far more typical case was that in which the class members had never registered their individual preferences regarding the subject of the suit. It was in this category of cases that the courts reached radically different results.

Some courts recognized that differences between named parties and class members could result in different measures of relief or even in conflicts over the shares of relief to which they might be entitled, but nevertheless *presumed* that all class members would agree on the limited goal sought in the lawsuit by the named representative. In *Rank v. Krug,*[94] for example, the court allowed a class action by owners of riparian rights to enjoin the damming of a river. The court noted that each plaintiff and each class member would be entitled to different quantities of water depending on acreage or prescriptive rights. The court recognized that there could be disputes as to each party's respective share, but nevertheless held that the threatened diversion of the river was a common danger that all class members *presumably* had the same interest in preventing.[95] In contrast, other courts in analogous cases required

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93. Courts denied such treatment either on the ground that the named party representative could not represent those with whom he or she disagreed, or on the ground that no class existed because a common relief could not be sought. For example, in Giordano v. Radio Corp. of Am., 183 F.2d 558 (3d Cir. 1950), labor union officials that were ousted from union offices sued on behalf of classes composed of the union memberships to enjoin their removal from office. The court, noting substantial support within the unions for the ousters, concluded that the plaintiffs could not adequately represent the class. The court explained:

> Here the affidavits upon which the court acted make it perfectly clear that the membership of Local 103 is sharply divided on the very question involved in this case, the expulsion of the plaintiff and his associates. Indeed a majority of the members who voted on the question at a membership meeting held on January 11, 1950, voted to sustain their expulsion. With a class thus sharply divided in opinion it would be absurd to say that the leader of one faction in the internecine struggle could adequately represent the whole membership.

183 F.2d at 560 (footnotes omitted); *see also* Gray v. Reuther, 99 F. Supp. 992, 993-94 (E.D. Mich. 1951) (complaint dismissed because plaintiff sought personal relief in his reinstatement to union office and because the election results showed a substantial number of the union members were opposed to plaintiff's position). In a similar vein, the court in Walker v. Grand Lodge I.B.P.O. Elks of the World, 147 F. Supp. 162 (D.D.C. 1957), refused to accept a suit by an officer of a fraternal organization alleging financial mismanagement and corruption by other officials as a class action on behalf of the organization membership. *Id.* at 167. The plaintiff requested that the organization be put in receivership and the court found no indication that any substantial part of the membership desired that the affairs of the organization be removed from its control. *Id.*

94. 90 F. Supp. 773 (S.D. Cal. 1950).

95. *Id.* at 807; *see also* Rank v. Krug, 142 F. Supp. 1, 158 (S.D. Cal. 1956) ("For an interest to exist which would be adverse to the interest of the plaintiffs, one would have to suppose that there was a property owner . . . who desired that his source of supply of water for agricultural, domestic, or municipal uses be cut off.").

For other examples of presumed commonality, see Redmond v. Commerce Trust, 144 F.2d 140, 151-52 (8th Cir. 1944) ("The possible situation that the beneficiaries [of a trust] may

a class representative to establish adequacy by showing that class members had in some way affirmatively demonstrated their common desire to achieve the goal of the litigation. In *Baim & Blank, Inc. v. Warren-Connelly Co.*,[96] an antitrust action was filed on behalf of retail electrical appliance dealers against manufacturers for alleged price fixing. The court dismissed the class claim because "[n]o facts have been sworn to establish that plaintiffs do, in fact, represent any person other than themselves or that they are authorized or can properly speak on behalf of 'all independently owned and operated retail stores selling electrical appliances.' "[97] The *Rank* and *Baim* decisions cannot be easily reconciled. If owners of riparian rights presumably shared the interest of a plaintiff seeking to maintain an unrestricted water source, so as to render that plaintiff an adequate representative of the class, why could retail appliance dealers presumably not share a common interest with one of their number who sought to show that all had been victimized by an illegal price-fixing scheme?

The question of how to ensure the vigorous advocacy of class interests proved a bit easier for courts to handle. But even here there was disagreement over the appropriate criteria for competent representation. In the 1940's, courts began to address this question in earnest, although it is unclear whether it was *Hansberry* or simple hostility to the rapid escalation of class actions that prompted this scrutiny.[98] Three different measures of competent protection of class interests appeared in these cases. One measure involved an inquiry into "the number appearing on record as contrasted with the number in the class" to determine whether there was "a sufficient number of persons to insure a fair representation of the class."[99] Some courts concluded,

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have divergent views as to their several undivided rights in the distribution of a trust fund . . . does not prevent this being a class action."); Matthies v. Seymour Mfg. Co., 23 F.R.D. 64, 76-77 (D. Conn. 1958) (no interclass antagonism to the subject matter of the lawsuit where both income and corpus beneficiaries joined to preserve the trust funds), *rev'd on other grounds*, 270 F.2d 369 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960); McNichols v. Lennox Furnace Co., 7 F.R.D. 40, 42 (N.D.N.Y. 1947) (in action for unpaid overtime compensation under Fair Labor Standards Act, employer need not be "identically situated" to form class).

96. 19 F.R.D. 108 (S.D.N.Y. 1956).

97. *Id.* at 111. In Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953), the trial court dismissed the class claim to enjoin racial segregation of a city-owned swimming pool on the ground that the plaintiff had "no standing to sue for the deprivation of similar civil rights of others." 104 F. Supp. at 857. The denial of class relief was affirmed on appeal on a different ground—the trial court's finding that no blacks other than the named plaintiff had sought admission to the pool. 205 F.2d at 52.

98. Decisions under the original version of Rule 23 frequently exhibited a deep-seated suspicion of the permissive use of class actions. *See* Bain & Blank, Inc. v. Warren-Connolly Co., 19 F.R.D. 108, 111 (S.D.N.Y. 1956) (suggesting that class action used to solicit clients). Chafee complained that "the situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity." Z. CHAFEE, *supra* note 11, at 200.

99. Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 632 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940).

without elaboration, that a gross disproportion between the number of representatives and the number in the class rendered the representative parties per se inadequate.[100] It is unclear whether such rulings reflected a belief that a large number of representatives would be more likely to protect the real interests of absentees, or a belief that a large class would produce a more complex and expensive suit that would be more difficult for an individual or small group to litigate effectively.[101] In contrast, other courts determined parties to be adequate class representatives because of preexisting fiduciary relationships with class members that were found to insure the protection of class interests.[102] A third measure of adequate protection utilized by the courts focused directly on the performance of the representative party in the litigation. A representative might demonstrate incompetence through particularly bad lawyering, such as the failure to contact class members to obtain evidence or support for the suit, or the failure to litigate the theory and facts supporting class relief.[103] Often, however, a finding of inadequate

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100. *See, e.g.*, Knowles v. War Damage Corp., 171 F.2d 15, 19 (D.C. Cir. 1948) ("The numerical factor weighs heavily against [the plaintiffs], they being two seeking to represent some 6,000,000. . . ."), *cert. denied*, 336 U.S. 914 (1949); Hess v. Anderson, Clayton & Co., 20 F.R.D. 466, 484 (S.D. Cal. 1957) (22 plaintiffs could not insure adequate representation of 8000); Pacific Fire Ins. Co. v. Reiner, 45 F. Supp. 703, 708 (E.D. La. 1942) ("The great disparity in numbers between the one pledge debtor 'personally' sued and the remainder of the class of 5000 and more, whom plaintiff seeks to have represented by the one, is an important fact to be considered in determining the question whether the defendant . . . is fairly representative of the class.").

101. Professor Moore in his treatise stated that "the question of adequate numerical representation (the number appearing on record as contrasted with the number in the class) may be considered by the trial court," but cautioned that "there is no one percentage of the class that must be parties on the record. . . . The safest rule seems, again, to be that there must be a showing of representation that will satisfy the court that the interests of the absentee parties will be adequately protected by the representative. . . ." 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.03, at 23-242 to -245; *see also* National Hairdressers' & Cosmetologists' Ass'n, v. Philad Co., 41 F. Supp. 701, 708 (D. Del. 1941) (one hairdresser found to be adequate representative of class of 5000 where suit was supported by a national organization of hairdressers all the members of which were class members), *aff'd*, 129 F.2d 1020 (3d Cir. 1942)

102. In Pascale v. Emery, 95 F. Supp. 147 (D. Mass. 1951), a libel action was brought against individual defendants and a class composed of the members of a local union. The court found that the local's business agent could adequately represent the class interest:

> The important question is whether in fact the representative or representatives named will adequately protect the interests of the whole class in matters involved in the litigation. [Defendant] Kelley holds responsible offices in both Local 201 and the International Union. Nothing has been suggested to the court to indicate that in the present action he cannot or will not adequately protect the interests of all the members of the unions.

Id. at 149; *see also* Walker v. Grand Lodge I.B.P.O. Elks of the World, 147 F. Supp. 162, 166-67 (D.D.C. 1957) (organizational auditor with access to organizational records could adequately represent the class so far as procurement of evidence is concerned; however, class status denied for other reasons).

103. One early example of this approach is provided by Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941). In *Weeks*, two retail gasoline dealers in Illinois filed suit under the antitrust laws on their own behalf and as representatives of a class of 900 other Illinois retailers against

advocacy depended on a totality of the circumstances.[104]

A question which began to play an undefined role in the courts' discussion of the qualities of an appropriate class representative was what type of notice had to be given to absent class members.[105] Rule 23 itself provided for notice to non-joined class members only in the event of a voluntary dismissal or compromise of the class claim.[106] Although in the wake of *Hansberry* some commentators argued that notice to absent class members

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19 oil companies, alleging that the companies had conspired to fix the wholesale price of gasoline and to force the retailers into oppressive contracts. *Id.* at 87. The district court dismissed the suit on the ground that there was no proper class under Rule 23 and that if there were a proper class, the two plaintiffs were not adequate representatives of the class. *Id.* On appeal, the Seventh Circuit noted that the retail dealers would qualify as a spurious class under Rule 23(a), but affirmed the dismissal of the class aspect of the action because the individual plaintiffs had failed to demonstrate an ability to adequately litigate the action for the class as well as for themselves. *Id.* at 95. The court noted that the plaintiffs had not responded to the defendants' affidavits describing different kinds of jobber contracts used in the state. The court went on to describe the plaintiffs' inadequate advocacy in some detail:

> [The plaintiffs] could have offered affidavits in opposition to defendants'. . . . In these affidavits they could have shown more in detail the theory and facts as to damages upon which they base their right to recovery. They could have met the proof that there were many different kinds of jobbers' contracts outstanding, by a showing, if such showing could be made, that the recoverable damages would be the same under all the contracts. They could have, and we think should have, shown some of the proof tending to establish their charge that they suffered damages as jobbers by virtue of the defendants' raise in prices to them. They could, and should, have supplied some proof that others in the class desired this suit to go on and that they knew of few, or no instances, where the members of the class were opposed to the prosecution of this class suit.

Id. at 94.

104. In Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir. 1940), the court rejected class status for the following reasons:

> [P]laintiff and his counsel resided many hundreds of miles from the seat of the court. The plaintiff was not and had not been for more than three years employed or insured; his interest was small; he and his counsel had been unable to present a valid claim in spite of two opportunities to amend the original complaint. Plaintiff made no averment that other persons had made claim similar to his or were asserting such claims or had asked that suit be brought. The pleadings were contradictory in form and wholly ineffective.

Id. at 632.

105. *See, e.g.*, Knowles v. War Damage Corp., 171 F.2d 15, 18 (D.C. Cir. 1948) ("It is pertinent to consider whether other members of the class have notice. . . ."), *cert. denied*, 336 U.S. 914 (1949); Walker v. Grand Lodge I.B.P.O. Elks of the World, 147 F. Supp. 162, 166-67 (D.D.C. 1957)

106. Rule 23(c) provided:

> **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court decides. If the right is one defined in paragraph (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Fed. R. Civ. P. 23(c) (1937), *amended by* FED. R. CIV. P. 23(c) (1966).

The advisory committee notes to this subsection consisted of a citation to McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholders Suit*, 46 YALE L.J. 421 (1937), without

was essential in order to create a binding judgment,[107] neither *Hansberry* nor any other decision required such notice.[108] Yet the lower courts theorized that notice could generate either support or opposition for the named representative, and thus provide some evidence of his or her representative character. In *Weeks v. Bareco Oil Co.*,[109] for example, the court concluded:

> Affirmative notice could have been given by [the plaintiffs] to others in the class, showing that they had, by letter or by newspaper, brought the existence of the present suit to the attention of others of the class. The reaction of the others could have then been shown to the court.[110]

The notice question, however, did not play a large role in class action adequacy determinations.[111] Courts that found the representative to be adequate and thus approved the class, did so without any reference to class notice.[112] Even in cases where a defendant class was sued and the defendant representative could not be assumed to be a willing representative, courts made the adequacy determination without regard to the lack of notice to class members.[113]

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further explanation. Presumably, the requirement that notice be given when a true class action was settled reflected the committee's understanding that only in such a case would all class members necessarily be bound by the result of the case. Fed. R. Civ. P. 23(c) advisory committee note (1937).

107. *See* Keeffe, Levy & Donovan, *supra* note 84, at 339; Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1064 (1954).

108. *See* Hansberry v. Lee, 311 U.S. 32, 40-43 (1940); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 379 n.85-87 (1967).

109. 125 F.2d 84 (7th Cir. 1941).

110. *Id.* at 94. For a further discussion of *Weeks*, see *supra* note 103.

111. Because the Federal Rules of Civil Procedure established no mechanism for obtaining court approval of notice to class members except in the event of a settlement, it is not surprising that the reported cases contain no example of a party demonstrating that he or she is a bonafide class representative by giving notice. Courts on occasion did rule that, after an adjudication on the merits, absent class members should be notified to come in and share in the fund found owing to the class. *See* Dickinson v. Burnham, 197 F.2d 973, 978 (2d Cir.) (notice sent to 159 class members entitled to share of the settlement), *cert. denied*, 344 U.S. 875 (1952); Hormel v. United States, 17 F.R.D. 303, 305 (S.D.N.Y. 1955) (notice to class members of favorable decision and possible appeal); Tolliver v. Cudahy Packing Co., 39 F. Supp. 337, 339 (E.D. Tenn. 1941) (notice to all class members only required after judgment for class).

112. *See, e.g.*, Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959) (though not a true class action, suit still maintained under Rule 23 because challenged statute allegedly deprived plaintiffs and others similarly situated of liberty and property without due process), *rev'd on other grounds sub nom.* Shelton v. Tucker, 364 U.S. 479 (1960); Matthies v. Seymour Mfg. Co., 23 F.R.D. 64 (D. Conn. 1958) (class status maintained by trust beneficiaries in suit against trustee by proving impracticability of requiring all possible beneficiaries, including remote contingent remaindermen, to join class); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.) (trust fund beneficiaries interested in fund's preservation were permitted class status, notwithstanding possibility that they shared divergent information regarding their rights in the fund), *cert. denied*, 323 U.S. 776 (1944).

113. *See, e.g.*, Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948) (employer's libel action against union members and members of unincorporated association, although not proper under state law, could be maintained as class action under Rule 23 in members' individual capacities as class representatives); Tunstall v. Brotherhood of Locomotive Firemen

There was also some confusion as to whether it was necessary for courts to be concerned with adequate representation in all class actions. A number of courts held that because the decree in a spurious class action did not bind absentees, a "searching inquiry into the adequacy of representation" was unnecessary.[114] Other courts concluded that the adequacy question should be addressed regardless of the category of class involved.[115] One complication arose because Rule 23 lacked any provision specifying how and when the determination of adequacy was to be made. Although it was generally accepted that the party seeking to represent the class had the burden of establishing representative adequacy, in practice a determination was made before trial only upon a motion to strike the class allegations from the pleadings. Representational adequacy would be contested at trial only if the opposing party chose to make it an issue.[116]

& Enginemen, 148 F.2d 403 (4th Cir. 1945) (representatives of unincorporated associations presumably representative of entire class); Pascale v. Emery, 95 F. Supp. 147 (D. Mass. 1951) (labor union's business agent and president adequately represented entire class in specific libel matters).

114. *See, e.g.*, Austin Theater, Inc. v. Warner Bros. Pictures, Inc., 19 F.R.D. 93, 96 (S.D.N.Y. 1956) (no need to inquire into adequate representation in a spurious class action because it is only a permissive joinder device); *see also* Kainz v. Anheuser-Busch, Inc. 194 F.2d 737, 745 (7th Cir. 1952) (adequate representation not an issue in absence of evidence contrary to complaint); Oppenheimer v. F.J. Young & Co., 144 F.2d 387, 389 (2d Cir. 1944) (complaint allegations sufficient in spurious class action); P.W. Husserl, Inc. v. Newman, 25 F.R.D. 264, 266 (S.D.N.Y. 1960) (description of class sufficient in spurious class action to show adequate representation); 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.10[7], at 23-2751 app. (Rule 23(a)(3) mere permissive joinder device requiring at least superficial inquiry to determine whether plaintiff alleged facts indicating adequate class representation).

115. *See, e.g.*, Hess v. Anderson, Clayton & Co., 20 F.R.D. 466, 479-80 (S.D. Cal. 1957) (true, hybrid, or spurious plaintiffs must convince court that they will in fact fairly insure adequate representation and thereby promote honest trials); *see also* Carroll v. Association of Musicians, 206 F. Supp. 462, 471 n.2 (S.D.N.Y. 1962) (unreasonable to allow a spurious class claim to stand when after trial, it appears that named plaintiffs' interests are clearly adverse to class), *aff'd*, 316 F.2d 574 (2d Cir. 1963).

116. *See, e.g.*, Pennsylvania Co. for Ins. v. Deckert, 123 F.2d 979 (3d Cir. 1941) (securities purchasers alleging fraud must demonstrate standing as representatives before injunction will issue); Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir. 1940) (whether class action fairly insures adequate representation is a fact question and condition precedent to maintenance of class suit); Oppenheimer v. F.J. Young & Co., 3 F.R.D. 220 (S.D.N.Y. 1943) (plaintiff's burden to prove insurance of adequate representation of entire class). Apparently, in order to encourage district judges to take action on their own motion and at an earlier stage in the proceedings to determine adequacy and to protect absent class members, the advisory committee on the federal rules recommended in 1955 an additional subsection to Rule 23 entitled "Orders to Insure Adequate Representation":

> The court at any stage of an action under subdivision (a) of this rule may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly [sic] to protect interests of absent persons who may be bound

Thus, after more than a century of experience with class action litigation, American courts had developed no uniform standards for assessing a representative party's adequacy to litigate on behalf of a class. The vast majority of suits which proceeded to judgment on behalf of classes did so without any explicit determination by the courts that the class was properly represented.

C. Rule 23 Revision: Adequacy is Formalized

Widespread dissatisfaction with Rule 23 led to its complete revision in 1966.[117] As revised, Rule 23(a) specified four prerequisites for any case to proceed as a class action: (1) the class is "so numerous that joinder of all members is impracticable"; (2) "questions of law or fact common to the class" exist; (3) the claims or defenses of the class representative are "typical"

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by the judgment, the court may, at any time prior to judgment, order an amendment of the pleadings, eliminating therefrom all reference to representation of the absent persons, and the court shall order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.01[4], at 23-17.

In its note to the proposed amendment, the advisory committee explained:

> The concluding sentence of the subdivision allows the court to eliminate all class-representation aspects from an action, and thereby limit the suit to the parties actually present in court. Thus even where all the requirements of Rule 23(a) for prosecution of a class action have been met, the court may so limit the action if the interests of the absent parties are not fairly protected.

Committee Note of 1955 to Proposed Amendment, *quoted in* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.01[4-5], at 23-18. The amendment, however, was not adopted by the Supreme Court, and the confusion with respect to the procedure for, and timing of, the determination of representative adequacy continued.

117. Most of the criticism that led to the revision of Rule 23 arose from the obscure and difficult to apply classifications of class actions according to the "jural relations" of the right the plaintiffs sought to enforce. The terms "joint," "several," and "common" had no clear and ascertainable meaning in the class action context. For example, Professor Chafee complained that "common" right could mean almost anything, and confessed that he was having as much trouble telling a "common" right from a "several" right as deciding whether some ties were green or blue. Z. CHAFEE, *supra* note 11, at 257. His confusion was shared by other writers. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 707 n.73 (1941) ("accursed labels"); Keeffe, Levy & Donovan, *supra* note 84, at 335 n.22 ("arbitrary distinctions"). The confusion was also shared by the courts, the classic example of which was the *Deckert* series of decisions, described with some humor by Professor Chafee. Z. CHAFEE, *supra* note 11, at 263-65. The plaintiffs filed what they thought was a hybrid class action; defendants contended that it was a spurious class action. *See* Deckert v. Independence Shares Corp., 27 F. Supp. 763, 769 (E.D. Pa. 1939), *rev'd,* 108 F.2d 51 (3d Cir. 1939), *rev'd and remanded,* 311 U.S. 282 (1940). The district court did not classify the case, but merely referred to the case as a "class bill." 27 F. Supp. at 769. The Third Circuit reversed the district court, finding the suit to be a spurious action. 108 F.2d at 55. The Supreme Court, reversing the court of appeals, did not discuss the question. *See* 311 U.S. at 282. On remand, the district court concluded that the suit was actually of the hybrid type. Deckert v. Independence Shares Corp., 39 F. Supp. 592, 595 (E.D. Pa.), *rev'd sub nom.* Pennsylvania Co. for Ins. v. Deckert, 123 F.2d 979 (3d Cir. 1941). The circuit court, reversing again, decided

of those of the class; and (4) the fair and adequate protection of the interests of the class by the representative party.[118] On their face, the first two prerequisites of numerosity and common question define the class itself, while the second two provide qualifications for the representative party: the representative's claims or defenses must be typical and he or she must protect the class interests. The commonality, typicality, and adequate protection requirements had no direct counterpart in the old rule.[119] Yet commentators and the rule's draftsmen assumed that this new language articulated existing doctrine.[120] It is true that foundations for these concepts can be found in the old rule and in the case law. The common question provision

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that no matter which type of action was involved, the plaintiffs were not adequate representatives of the class and therefore a class action was improper. 123 F.2d at 983-84. Mercifully, the case never went to trial and no further appeals were filed. "The result of such confusion is that neither parties nor their attorneys can determine in advance of a court decision in their case into which category their action is to be placed." Keeffe, Levy & Donovan, *supra* note 84, at 335 n.22.

Related criticism of old Rule 23 resulted from the confusion as to the binding effect of judgments rendered in actions under the rule. *See id.* at 334; Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 824 (1946). In cases which were clearly spurious, the judgments rendered therein were treated as having res judicata effects on absent class members. *See, e.g.*, Weeks v. Bareco Oil Co., 125 F.2d 84, 91 (7th Cir. 1941) (members of group whose interests accord with interests of those bringing suit are bound); National Hairdressers' & Cosmetologists' Ass'n v. Philad Co., 41 F. Supp. 701, 708 (D. Del. 1941) (class members who have not removed themselves from a class can use judgment to preclude relitigation of issues). In other cases, courts classified actions as true class suits with binding judgments when it seemed that the rights involved were several. *See, e.g.*, System Fed'n No. 91 v. Reed, 180 F.2d 991, 997-98 (6th Cir. 1950) (action was true class suit even when complaint sought to enforce a several right). The spurious label was utilized when full binding effect seemed appropriate. *See, e.g.*, York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

The final deficiency of the old rule was that it "did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class. . . ." Advisory Committee's Note to Proposed Rule 23, 39 F.R.D. 98, 98-99 (1966) [hereinafter cited as *Advisory Committee Note*].

118. There were three other major changes in Rule 23. The "jural rights" categories of the old rule were revised into three categories in subsection (b) which functionally described the different circumstances thought to be appropriate for class actions. Subsection (c), which had no counterpart in the old rule, required various procedural steps for class action determination; specified the content and scope of judgment in the three forms of action described in subsection (b); provided for class action treatment of particular issues; and provided for the division of a class into sub-classes. Subsection (d) listed various orders a court might issue for the proper management of a case.

119. Original Rule 23(a) contained only two prerequisites:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

Fed. R. Civ. P. 23(a) (1937), *amended by* FED. R. CIV. P. 23(a) (1966). For the full text of original Rule 23(a), see *supra* note 64.

120. The advisory committee's note to new Rule 23(a) contained no explanation for the revised language. The committee's brief description merely noted that it "states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the

resembled the requirement for a spurious class action,[121] and the typicality requirement could be seen as an attempt to codify the standing rule derived from *Swormstedt* and *Ben-Hur*. The adequate protection concept had its roots both in the adequate representation requirement of the old rule and in cases, such as *Hansberry*, that focused upon the practical ability of the representative and the representative's counsel to represent the class. There was, however, no uniform practice which could be used to infuse Rule 23(a) with meaning.[122] Courts had only sporadically and inconsistently addressed representative adequacy issues, and no court had held that the representative's standing to litigate and the representative's practical ability to represent the class were distinct questions to be answered independently in each case.

The lack of guidance from the draftsmen of Rule 23 and the diverse nature of the pre-1966 case law led to immediate confusion in the application of the prerequisites. The common question requirement was given the shortest shrift. It was ignored[123] or found to be satisfied without any indication of the basis for the conclusion.[124] A few courts treated the common

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members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties." *Advisory Committee Note, supra* note 117, at 100.

Benjamin Kaplan, the reporter to the advisory committee, described Rule 23(a) as "a somewhat improved version of the text of the rule of 1912 and of the opening language of the 1938 rule." Kaplan, *supra* note 108, at 387. Professor Moore concluded that "revised (a) represents no material departure from its counterpart provisions in original (a)." 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.03, at 23-105; *see also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PRODEDURE § 1759, at 572 (1972) (requirements of old Rule 23(a) preserved by 23(a)(1) and (a)(4)). Other writers, describing the new version of the rule, hardly discussed the revised language of subdivision (a). *See* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1214 (1966); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1967); Address by Charles Allen Wright, *Proceedings of Twenty-Ninth Annual Judicial Conference of the Third Circuit*, 42 F.R.D. 437, 563-65 (1966); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 644 (1965).

121. Under former Rule 23(a)(3), a spurious class was one in which the rights sought to be enforced were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. P. 23(a)(3) (1937), *amended by* FED. R. CIV. P. 23(a)(3) (1966).

122. The only exception to this generalization was the practice concerning numerosity. Under the original version of the rule, numerosity was satisfied "when persons constituting a class are so numerous as to make it impracticable to bring them all before the court." Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). "[T]his 'impracticability' requirement survived without alteration the transition from old Rule 23 to new Rule 23." *Id.; see also* 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1762, at 592 (numerosity requirement "little changed from the text of the original rule").

123. *See, e.g.*, Rosado v. Wyman, 322 F. Supp. 1173, 1192 (E.D.N.Y.) (court did not explain finding of common question of law and fact), *aff'd on other grounds*, 437 F.2d 619 (2d Cir.), *rev'd on other grounds*, 397 U.S. 397 (1970).

124. *See, e.g.*, Vernon J. Rockler & Co. v. Graphic Enter., Inc., 52 F.R.D. 335, 340 (D. Minn. 1971) (Section 10(b)-5 action distinguishes Rule 23's common questions requirement when material variations occur in defendant's representations to plaintiff and degree of reliance varies among class members, especially when significant portions of plaintiff's claim rests upon alleged omissions of material facts common to all shareholders under section 10(b)-5); Berman v. Narrgansett Racing Ass'n, Inc., 48 F.R.D. 333, 337 (D.R.I. 1969); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 401 (S.D. Iowa 1968) (individual damage questions not predominant

question requirement as if it were identical to the typicality requirement.[125] The two leading treatises on the federal rules characterized the common question requirement as "unnecessary" and "superfluous."[126] In the few cases where class status was denied because of the lack of a common question, the courts merely emphasized the great factual diversity of the potential claims and the case-by-case nature of the commonality inquiry.[127]

The typicality requirement received treatment similar to the common question requirement.[128] Although some courts candidly expressed doubt as to

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issue in antitrust action; existence of common questions presumed where defendant allegedly controlled nearly all sources of plaintiff's supplies), *aff'd on other grounds,* 409 F.2d 1239 (8th Cir. 1969); Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 172 (D.S.D. 1967) (common questions of law and fact in SEC action override questions regarding individual members because varying degrees of reliance are speculation). Some courts addressed commonality only in the context of a Rule 23(b)(3) action where a common question predominated. *See, e.g.,* Fischer v. Kletz, 41 F.R.D. 377, 380 (S.D.N.Y. 1966) (common questions predominant issue in stock and bondholders' action against former officers and directors to recover on grounds of allegedly improper misrepresentations in financial statements); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 683 (N.D. Ind. 1966) (section 10(b) action maintainable as class action until showing at trial that common questions are sufficiently dissimilar to preclude class status).

125. Courts persisted in this despite the fact that the commonality provision on its face was a limit on the class rather than on the representative party. *See* Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970) (typicality requirement restates commonality requirement); American Airlines, Inc. v. Transport Workers Union, 44 F.R.D. 47, 48 (N.D. Okla. 1968) (typicality requirement satisfied since representatives "share in common with the class any claim or defense it has"); Mersay v. First Republic Corp., 43 F.R.D. 465, 468-469 (S.D.N.Y. 1968) (typicality requirement satisfied if representative's interest not in conflict with class interest).

126. "This express provision [Rule 23(a)(2)] seems unnecessary since, in addition to the prerequisites of subdivision (a), an action can be maintained as a class action under Rule 23 only if it satisfies the requirements of at least one of the three types of class actions provided for by subdivision (b)," and the existence of common questions is implicit in a finding that the action satisfies any of the 23(b) categories. 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.06-1, at 23-171. "It should be noted that Rule 23 (a)(2) actually may be a superfluous provision, or at least partially redundant, since the existence of common questions can be viewed as an essential ingredient of a finding that the case falls within one of the three categories of class actions described in subdivision (b)." 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1763, at 609.

127. *See* Nguyen Da Yen v. Kissinger, 70 F.R.D. 656, 662-64 (N.D. Cal. 1976) (claims on behalf of Vietnamese children allegedly put up for adoption illegally in the United States failed to show factual commonality), *modified on other grounds,* 528 F.2d 1194 (9th Cir. 1976); Metcalf v. Edelman, 64 F.R.D. 407, 409-11 (N.D. Ill. 1974) (in suit by welfare recipients claiming failure to provide class with benefits "compatible with health and well-being," common issues lacking because separate adjudications required to determine if any particular class member was in fact so deprived); Burnham v. Department of Public Health, 349 F. Supp. 1335, 1343 (N.D. Ga. 1972) (patients at mental health institution challenging constitutional adequacy of diagnosis and treatment did not meet commonality requirement because adequacy of care could only be determined on a patient-by-patient basis).

128. "The Advisory Committee's Notes offer no assistance in defining the provision." 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.06-2, at 23-185 n.1. Professor Kaplan, the committee's reporter, noted only that Rule 23(a)(3) "emphasizes that the representatives ought to be squarely aligned in interest with the represented group." Kaplan, *supra* note 108, at 387 n.120.

the purpose of the typicality requirement,[129] others suggested that a lack of conflict between the representative's interests and those of absent class members rendered the representative's claim "typical" of the class.[130] But because lack of conflict had, at least since *Hansberry,* been a measure of adequacy, some courts merely equated the typicality requirement with that of adequate protection of class interests.[131] Because it was often difficult to ascribe independent meaning to the typicality requirement,[132] the majority of courts that did not treat the typicality requirement as an aspect of

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129. *See, e.g.,* White v. Gates Rubber Co., 53 F.R.D. 412, 414 (D. Colo. 1971); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D. Minn. 1968).

130. *See, e.g.,* Buchholtz v. Swift & Co., 62 F.R.D. 581, 597 (D. Minn. 1973) (typicality met when claims of representatives and class members are co-extensive and not antagonistic); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 515 (W.D. Pa. 1971) (claims of nominal representative must be representative of claims of class members and cannot conflict with or be inimical to class members' claims); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567 (D. Minn. 1968) (typicality means lack of adversity between representatives and class members).

131. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 898 (S.D.N.Y. 1975) (requirement of typicality under Rule 23(a)(3) same as adequacy requirement under 23(a)(4)); DuPont v. Perot, 59 F.R.D. 404, 412 (S.D.N.Y. 1973) (conflict of interest and antagonism prevents representative from meeting the requirements of typicality and adequacy); Rosado v. Wyman, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970) (typicality requirement "designed to buttress the fair representation requirement in Rule 23(a)(4)"), *aff'd on other grounds,* 437 F.2d 619 (2d Cir.), *rev'd on other grounds,* 397 U.S. 397 (1970). Professor Wright commented:

> The requirement in Rule 23(a)(3) that the claims or defenses of the representatives must be typical of those of the class is probably no more than a cryptic way of saying that the representative must not have interests that conflict with those he purports to represent. . . . That requirement, certainly applicable under both the old and new rule, is here considered an aspect of the adequacy of representation.

C. WRIGHT, FEDERAL COURTS § 72, at 307 n.14 (2d ed. 1970).

132. Some courts sought to give the typicality requirement a meaning independent of the other provisions of Rule 23(a), but those interpretations were widely divergent. One court suggested that the representative's claim must "resemble" or "exhibit the essential characteristics of" the claims or defenses made on behalf of the class. Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977). Professor Wright agreed that "Rule 23 (a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are raised." 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1764, at 614. Other courts held that the representative's claims could be typical of the class claim only when the representative's claims were "co-extensive" with those of the class members. Koehler v. Ogilvie, 53 F.R.D. 98, 100-01 (N.D. Ill. 1971) (in a contest of the validity of state divorce laws, named divorced plaintiffs had no coextensive interests with the class of potential divorced men); Insley v. Joyce, 330 F. Supp. 1228, 1234-35 (N.D. Ill. 1971) (in a challenge to a provision in a union pension plan, named retired plaintiff had no coextensive interests with employed union members). There was no indication that the draftsmen of the new rule intended to effect the radical restriction of class actions which would result from such a construction. Thus, most courts either explicitly or implicitly rejected this approach. *See, e.g.,* Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970) (class action rule does not require that claim of representative plaintiff and of each member of the class be absolutely identical); Mersay v. First Republic Corp., 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968) (plaintiff satisfies Rule 23(a)(3) when plaintiff's claim and class's claims stem from a single event or are based on same legal or remedial theory); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567 (D. Minn. 1968) (possible disparate proof of damages do not make the

adequate protection either ignored it or found compliance with little or no explanation.[133]

The courts could not, however, ignore the adequacy requirement itself. Under the new rule it was plain that judgments in all class actions would bind all class members, including absent ones.[134] This rule of law made adequate protection of class interests the sine qua non of representative capacity, given each class member's due process right to fair representation in any action where the judgment rendered all class members bound.[135] Despite the confusion over the exact function of each of the Rule 23(a) prerequisites, a rough judicial consensus settled on four basic factors as essential for adequate class protection. These four factors were articulated by the Second Circuit in *Eisen v. Carlisle & Jacquelin:*[136] (1) the absence of conflicts of interest between the party and the class; (2) the representative nature of the party's individual claim; (3) the ability and willingness of the representative to carry forward the class claim; and (4) the competence of the representative's attorney.[137]

Each of factors identified in *Eisen* resembled concepts of adequacy that

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representatives' claims atypical).

Taking a different approach, in White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971), the court held that in order to satisfy Rule 23(a)(3), a representative must demonstrate "that there are other members of the class who have the same or similar grievances as the plaintiff." *Id.* at 415. Under this subjective test, a representative's claim would not be typical of the class claim absent proof that other persons in the putative class had actually made the same or similar claims or had suffered the same grievance. *White* was an employment discrimination suit filed on behalf of a class of discharged minority employees. *Id.* The class claim was dismissed because the plaintiff was unable to show that other discharged employees had complained of, or suffered from, discrimination. *Id.* The *White* approach to typicality attracted a few adherents. *See* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269-70 (10th Cir. 1975) (accepting *White*); Sullivan v. Winn Dixie Greenville, Inc., 62 F.R.D. 370, 375 (D.S.C. 1974) (adopting *White*); Green v. Cauthen, 379 F. Supp. 361, 372 (D.S.C. 1974) (adopting *White*). But the idea that a class could be maintained only where class members could be shown subjectively to share the desires or beliefs of the representative had been abandoned as a theory of representative litigation more than two centuries earlier. *See* Duncan v. Tennessee, 84 F.R.D. 21, 31 (M.D. Tenn. 1979) (criticizing *White* as too restrictive); Ridgeway v. International Bhd. of Elec. Workers Local No. 134, 74 F.R.D. 597, 604 (N.D. Ill. 1977) (*White* inconsistent with other requirements of Rule 23).

133. *See, e.g.,* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (typicality not dispositive when alleged oral conspiracy affects price fixing in antitrust action); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971) (typicality not subverted by defendant's affirmative defense; plaintiff allowed to establish facts consistent with typicality requirements); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967) (taxpayer class suit maintained as effective watchdog of public welfare, though plaintiff might be inadequate representative of large class seeking complex private relief).

134. *See Advisory Committee Note, supra* note 117, at 105-06.

135. *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67, 74-75 (5th Cir. 1973); Comment, *The Importance of Being Adequate: Due Process Requirements Under Class Actions Under Rule 23,* 123 U. PA. L. REV. 1217, 1224 (1975).

136. 391 F.2d 555 (2d Cir. 1968).

137. *Id* at 562-63.

had made sporadic appearances in the pre-1966 case law.[138] The revised Rule 23, which delineated the class prerequisites with a separate subsection and separated the question of whether a class existed from the question of whether it was properly represented, did not markedly change the nature of the judicial focus upon the proposed representative's ability to protect the class. Scrutiny of the relationship between the named party, the individual claim, and the interests of absentee class members remained what it had been under the old rule—an exercise in judicial presumptions.

With respect to the conflict of interest factor, courts and writers frequently resorted to relatively unhelpful standards, such as one that required that the conflict "must be as to the subject matter of the suit"[139] or "go to the heart of the controversy."[140] Under these formulations, any conflict or potential conflict of interest which was unrelated to the litigation was uniformly held not to render representation inadequate.[141] As in *Hansberry,* circumstances which demonstrated that the relief sought was not desired by a significant portion of those in the class sufficed to create a conflict of interest.[142] Not all courts insisted on an overt demonstration of antagonism, and, in a few cases, courts assumed that the relief requested would be opposed by a significant portion of the class without any concrete showing of such a conflict.[143] Most courts, however, showed no inclination to search for potential conflicts as long as the relief sought was presumably beneficial to class

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138. *See supra* text accompanying notes 85-86, 91-93, 99-104.

139. Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970).

140. 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1768, at 639 n.90.

141. The fact that a plaintiff was a business competitor of the class members was generally held not to render the plaintiff's representation inadequate. *See* Windham v. American Brands, Inc., 68 F.R.D. 641, 650-51 (D.S.C. 1975); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 463-64 (E.D. Pa. 1968); Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968); *cf.* Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 464 (10th Cir. 1974) (antitrust suit on behalf of beet sugar purchaser against suppliers could not proceed as class action because relief would affect the competitive position of class members); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 767 (8th Cir. 1971) (potential conflict between beneficiaries over the distribution of a fund blocks a class action on their behalf to preserve the fund).

142. Representatives "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent [do] not afford that protection to absent parties which due process requires." Hansberry v. Lee, 311 U.S. 32, 45 (1940). A conflict of interest could be implied when actions of class members were inconsistent with the relief requested or position assumed on their behalf in the litigation. For example, in Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970), a stockholders' derivative class action suit to enjoin a proposed merger, a majority of the class members voted in favor of the merger after suit was filed. In dismissing the class's allegations, the court said: "[S]ince over eighty percent of the class voted in favor of the proposal of which the plaintiffs' suit complains, and they did so with full knowledge of the plaintiffs' suit, it is somewhat difficult for the plaintiff to claim that he represents the class." 419 F.2d at 1117.

143. Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968), was a class action filed on behalf of all "working women" in the state to enjoin enforcement of state laws limiting the hours

members.[144] When the relief requested was of a type that most class members would presumably welcome, such as monetary damages, courts usually held that no conflict was present, even without any affirmative showing that class members actually desired the relief sought.[145] This policy judgment expressed the now common perception of the utility of class actions as a device whereby

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which could be worked by female employees. The *Ward* court denied class status because of its conviction that many class members might prefer the statute's protection. *Id.* at 168. In a similar vein, in Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), an action was brought by prison inmates who sought to abolish county work camps on the ground that operating the camps violated the eighth and thirteenth amendments. The *Wilson* court held that the plaintiffs could not represent a class of all state prisoners because the court perceived a conflict with the desires of members of the class. *Id.* at 1011. "The court is far from convinced that all prisoners at county public work camps would prefer being inmates at [another institution]. To the contrary, many prefer the comparative freedom, the proximity to their families, and the general association with less-hardened criminals in the works camps." *Id.* at 1012.

A few courts took this exercise of judicial speculation even further and found conflict which arose not from the nature of the relief sought, but from the potential long-term effects of the suit, which the courts assumed would not be desired by class members. Thus, in Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972), the plaintiff sought to represent a class of some 50,000 policyholders in an action to recover statutory penalties under the Truth in Lending Act for the company's failure to disclose required data to policyholders. The court refused to maintain the suit as a class action because of its assumption that, were plaintiff to succeed, the class judgment would render the insurance company unable to meet its commitments. The court concluded that many policyholders would therefore rather waive the statutory damages than bankrupt the company. *Id.* at 646.

Similarly, in Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972), an antitrust action on behalf of a class of present and former automobile dealers, the court found that the interests of the plaintiff, a former dealer, were antagonistic to those of the class of current franchisees. Because the defendant had only a small share of the relevant market, the court concluded that the company might prefer to go out of business rather than incur the expenses of defending the suit or the risk of a substantial judgment. Having no on-going business relation with the defendant, the plaintiff was only interested in damages. The court assumed that even though current franchisees would benefit from a damage award, they would rather keep the defendant in business in order to insure a continuing supply of cars and parts. *Id.* at 29.

144. The speculative approach, illustrated by the cases cited *supra* in note 143, garnered little support. *See* White v. Deltona Corp., 66 F.R.D. 560, 564 (S.D. Fla. 1975); Seligson v. The Plum Tree Inc., 61 F.R.D. 343, 346 (E.D. Pa. 1973); *see also* Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23,* 53 B.U.L. REV. 406, 420-42 (1969) (arguing that analysis of class action's impact on defendant may be relevant in measuring whether representative's interests are compatible with those of class) [hereinafter cited as Note, *Class Actions*]; *cf.* Note, *Developments, supra* note 24, at 1495 ("The first response of a court faced with allegations that class suit itself injures absentees . . . should be to obtain information about the situation of class members, and then consider the usefulness of available judicial action less drastic than termination of the class suit.")

145. Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970) (possible divergent views regarding distribution of fund will not defeat class action); Vernon J. Rockler & Co. v. Graphic Enter., Inc., 52 F.R.D. 335, 343 (D. Minn. 1971) (unsubstantiated allegation of potential conflict not sufficient to deny class standing); Moss v. Lane Co., 50 F.R.D. 122, 125 (W.D. Va. 1970) (where relief requested would benefit all class members, class action not defeated by displeasure of some class members), *aff'd in part,* 471 F.2d 853 (4th Cir. 1973).

group relief could be obtained for people who would be unable or unwilling to pursue their claims individually.[146]

The other *Eisen* factors were more difficult for courts to evaluate. The determination of representativeness was often subsumed into an inquiry about typicality.[147] In *Rosado v. Wyman,*[148] a noted district court judge, Judge Weinstein, articulated a rationale for the typicality requirement: "[I]f the claims and defenses are typical then there will be every reason for the representatives to support their own claims and so advance the claims of others in a like position."[149] Clearly, the representatives' pursuit of their own claim could advance the class's interests even if the representatives' and class's claims were neither legally nor factually identical.[150] The most pragmatic solution was to make case-by-case determinations of whether the representatives'

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146. In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), the plaintiff sought to represent a class of odd-lot stock investors and alleged that the defendants, two brokerage houses and the New York Stock Exchange, had conspired to fix the odd-lot differential brokerage fee at an excessive amount in violation of the Sherman Act. While noting that some members of the class might be satisfied with the defendants' pricing policies, the Second Circuit commented that "all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive." *Id.* at 562. This result was justified because a "primary function of the class suit [was] to provide 'a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.' " *Id.* at 563 (quoting Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied,* 382 U.S. 816 (1966)); *cf.* Note, *Class Actions, supra* note 144, at 426 (policy underlying Rule 23 undercut when court allows class action to proceed in the face of "massive indifference" of class members).

147. *See* Koehler v. Ogilvie, 53 F.R.D. 98, 100-01 (N.D. Ill. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968). As noted *supra* in text accompanying notes 129-33, there was considerable confusion over the meaning of the Rule 23(a)(3) requirement of "typicality." *See also* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.07[2], at 23-219 (requirement of coextensive interests is a restatement of typicality requirement). A number of courts equated typicality with absence of conflict, while others gave it an independent meaning or treated it as buttressing the fair representation requirement of Rule 23(a)(4). In any event, there was general agreement that in order to be representative the plaintiff's claim could not differ too greatly from the claims of the class.

148. 322 F. Supp. 1173 (E.D.N.Y.), *aff'd on other grounds,* 437 F.2d 619 (2d Cir.), *rev'd on other grounds,* 397 U.S. 397 (1970).

149. 322 F. Supp. at 1193. Although this rationale for the typicality requirement had not been articulated so plainly in prior decisions, it certainly was the basis for the results of the earlier cases. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Doglow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Mersay v. First Republic Corp. of Am., 43 F.R.D. 465 (S.D.N.Y. 1968).

150. As a preliminary matter, the representatives were required to be members of the class they sought to represent, and to allege an injury sufficient to provide article III standing. Bailey v. Patterson, 369 U.S. 31 (1962), was a suit on behalf of black residents of Mississippi to enjoin enforcement of state laws requiring racial segregation in public transportation. The plaintiffs also sought to enjoin state criminal prosecutions under the challenged statutes. In a brief per curiam opinion, the Court held that because the plaintiffs had not alleged that they were being prosecuted or threatened with prosecution, they lacked standing to enjoin the criminal prosecutions and could not "represent a class of whom they are not a part." *Id.* at 33. The rest of the opinion made clear, however, that the plaintiffs were entitled to attack the constitutionality of the statutes on behalf of all blacks. *Bailey* was generally interpreted as requiring

and class's claims shared enough common elements to assure that the suits would not result in virtually separate actions.[151] Although a few writers argued that the only way to protect absent class members was to require that the class's claim mirror the representatives' claim,[152] the courts did not require

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merely that the plaintiffs' injury be one that placed them in the class of people they sought to represent. *See, e.g.,* Basch v. Tally Indus., Inc. 53 F.R.D. 14, 19 (S.D.N.Y. 1971) (when no plaintiff could recover as member of a class, none can represent class); Newman v. Avco Corp., 313 F. Supp. 1069, 1071 (D. Tenn. 1970) (named plaintiff must be a member of the class sought to be represented).

151. One example of this pragmatic approach was Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967). In *Siegel,* five fried chicken franchise holders in northern California sued the franchisors and others on behalf of 650 franchisees nationwide. The plaintiffs alleged that the defendants had conspired to fix prices and tie-in product sales, and coerced compliance with anti-competitive policies by threatening franchise cancellation. *Id.* at 724. The defendants argued that because of market dissimilarities, the named plaintiffs' claims could not, in fact, be similar to those of franchisees located in other areas of the country. *Id.* at 726. While conceding that proof of the class's claims would entail proof of facts and legal theories different from those necessary to prove the plaintiffs' own claims, the court noted that the common franchise agreement was the focal point of the alleged actions of the defendants. *Id.* at 727. Finding that the individual and class claims proceeded from "a common nucleus of operative facts," the court denied the defendants' motion to strike the class allegations from the complaint. *Id.* at 728. An unarticulated premise of the decision was that plaintiffs' proof of their claims would buttress proof of the class allegations and vice versa. The court noted that if, during the course of discovery, it was shown that the facts needed to support the class and individual claims were "so varied as to render the action unmanageable, . . . the court [could] order that the class allegations be stricken and that the action proceed on behalf of the named plaintiffs alone." *Id.* at 727.

Another example is found in Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y.), *aff'd on other grounds,* 437 F.2d 619 (2d Cir.), *rev'd on other grounds,* 397 U.S. 397 (1970). *Rosado* was an action challenging distribution of federal welfare funds. According to the court, while the plaintiffs were subject to a different schedule of benefits than class members residing in other parts of the state, this discrepancy did not make their claims atypical where the suit attacked the validity of the statewide scheme of distribution. *Id.* at 1192. Nor did the fact that class members from some parts of the state would benefit more from the suit than those residing in other parts necessarily mean that the named plaintiffs could not adequately represent the statewide class, because "the intent of the representative parties was to raise all AFDC payments throughout the State." *Id.* at 1193.

A contrasting example is found in Lidie v. California, 478 F.2d 552 (9th Cir. 1973). *Lidie* was a suit on behalf of California welfare recipients seeking injunctive and monetary relief for the state's failure to supply food stamps to eligible recipients within the time period allowed by federal regulations. The Ninth Circuit affirmed dismissal of the class complaint because of the "idiosyncratic problems" presented by the three named plaintiffs. The court stated:

> The situation of the original plaintiffs, Cooley, Lidie, and Jordon, appear to be unusual. Cooley was not eligible for food stamps at all, because he ate a majority of his meals in restaurants. Lidie and Jordon had been dropped for failure to use the stamps. The delay they complain of was in their attempt at recertification. There were also many disputed factual issues concerning each of their applications.

Id. at 555. Because of the unique aspects of their individual cases, it could not be said that proof of their individual claims would even support, much less establish, the class's claims. Thus, the plaintiffs' claim was not sufficiently representative for the class's claim to insure adequate representation. *Id.*

152. *See* Ashe, *The Class Action: Solution for the Seventies,* 7 NEW ENG. 1, 17 (1971); Note, *Class Actions, supra* note 144, at 431.

identity of the claims in order to satisfy the typicality requirement.[153] But even where there was no conflict between the interests of the representatives and those of the class, and where the representatives' claim sufficiently overlapped with the class claim to be categorized as typical, absent class members would only be protected if the representatives and their attorney actively pursued the class claim.[154]

Case-by-case scrutiny of the competence of the representative and the attorney proved to be more problematic than case-by-case scrutiny of the interest. Despite general recognition that the ability, resources, and motivation of the representative team were important determinants of the representative's adequacy to represent, little more than lip service was paid to actual inquiry into the existence of these factors.[155] Courts were reluctant to pursue such inquiries because of two related difficulties. First, any opposition

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153. As Professor Moore observed:

> [T]he concept [typicality] has produced pragmatic judicial choices establishing the outer limits of tolerable legal and factual differences between the interests of the members he purports to represent in relation to the common object or subject matter of the action. When those differences in interest become so great as to question whether the interests of the absentees will, as a practical matter, be adequately represented before the court, the court should either dismiss the class action, or, if it is realistic to do so, should restructure the action by using the variety of flexible devices available to insure adequate representation.

3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.07[2], at 23-221.

154. *See* Z. CHAFEE, *supra* note 11, at 231 (class representation must be such as would "put up good fight"); *see also* Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968) (quoting Chafee); Mersay v. First Republic Corp., 43 F.R.D. 465, 470 (S.D.N.Y. 1968) (primary criterion is vigor which representative asserts and defends class interests); 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1766, at 633 n.74 (representative must assure the vigorous prosecution or defense of an action).

155. Courts uniformly held that the representatives' attorney must be competent and experienced. In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), the court stated: "[t]o be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation." *Id.* at 522; *see also* Wolfson v. Solomon, 54 F.R.D. 584, 590 (S.D.N.Y. 1972) (adequate representation insured by counsel's expertise in field); Cohen v. District of Columbia Nat'l Bank, 59 F.R.D. 84, 89-90 (D.D.C. 1972) (following *Eisen's* criteria for adequate representation); Mack v. General Elec. Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971) (counsel experienced in racial matters assures adequate representation in discrimination suit). But courts proved reluctant to actually engage in evaluation of the abilities of attorneys appearing before them. *See* 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.07 [1-1], at 23-216 (inquiry into competence of counsel often perfunctory, since courts are understandably reluctant to predict inadequacy of counsel); Note, *Developments, supra* note 24, at 1471-72 n.93 (concluding that judicial inquiry into qualifications of class counsel almost always pro forma). This reticence, and the noted reticence of lawyers to challenge the abilities of fellow attorneys, meant that findings concerning the competence of counsel simply were not made in the large majority of cases. *See* Donelon, *Prerequisites To Class Actions Under New Rule 23,* 10 B.C. INDUS. & COM. L. REV. 527, 536 (1969) (warning that attack on opposing counsel's qualifications "strategically disastrous unless the incompetence charged is specific, supported by solid evidence, and so apparent as to be obvious"). The small number of decisions in which attorneys were held to be inadequate to represent class interests were made in the later stages of proceedings and were based on a demonstrated

to maintenance of the class was likely to come at an early stage of the proceeding—well before the court had an opportunity to observe the actual performance of the representatives and their counsel.[156] Second, neither the legislative history nor the case law provided the courts with any standard for predicting adequate performance by the representative team.[157]

Courts developed a uniform approach to the determination of team competence only to the extent that they agreed that some factors were *not* relevant to the determination. For example, the quantitative approaches in which courts relied on the size of the party's claim or the size of the named class[158] were rejected as measures of adequacy after 1966. In *Eisen,* the trial court had dismissed the class suit on behalf of odd-lot stock investors, in part, on the ground that the plaintiff's damages (estimated at $70)[159] were "comparatively miniscule" and rendered him an inadequate representative.[160] The

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failure to pursue the class claims. *See* Roman v. ESB, Inc., 550 F.2d 1343, 1356 (4th Cir. 1976) (no res judicata effect where representation of class at trial was inadequate because of failure to develop evidence); Fendler v. Westgate Calif. Corp., 527 F.2d 1168, 1170 (9th Cir. 1975) (inability of counsel to file legally adequate complaint after three attempts resulted in denial of class certification); Gonzales v. Cassidy, 474 F.2d 67, 76 (5th Cir. 1973) (failure to appeal denial of retroactive relief to class after named plaintiff awarded full relief requested rendered representation of class indadequate for res judicata purposes).

156. Rule 23(c)(1) provides in part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23. Not until East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), was it clear that it was the plaintiff's obligation to initiate the class maintenance decisions under Rule 23(c)(1). But courts had generally viewed the rule as contemplating a prompt determination of class status even if not contested. *See, e.g.,* Jackson v. Cutter Laboratories, Inc., 338 F. Supp. 882 (E.D. Tenn. 1970); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

157. *See, e.g.,* Doglow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968) (counsel found adequate without explanation); Mersay v. First Republic Corp., 43 F.R.D. 465, 470 (S.D.N.Y. 1968) (court concluded counsel adequate without explanation or reasons); *see also* 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1766, at 633 n.74. But original Rule 23 had no counterpart to Rule 23(c), and most of the decisions discussing the issue of adequate representation were rendered after trials on the merits, thus allowing the courts to examine the *actual* performance of representatives and counsel. Hansberry v. Lee, 311 U.S. 32 (1940), for example, was a collateral attack on an earlier court proceeding. *See also* Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941) (district court, after examining the evidence, within its discretion in dismissing the class action component due to plaintiff's inadequate representation); Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir.), *cert. denied,* 311 U.S. 700 (1940) (district court justified in factual finding that plaintiff did not adequately represent his class).

Because of the general uncertainty over what had to be proved to establish adequacy, it was not unusual for either party to move for a determination of adequacy prior to trial. Thus, the question was left to be resolved, if at all, by the court's own motion. *See* United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1979); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Beasley v. Kroehler Mfg. Co., 406 F. Supp. 926 (N.D. Tex.), *aff'd,* 538 F.2d 897 (5th Cir. 1976); Jackson v. Cutter Laboratories, Inc., 338 F. Supp. 882 (E.D. Tenn. 1970).

158. For pre-1966 quantitative approaches, see Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir. 1940); Molina v. Sovereign Camp W.O.W., 6 F.R.D. 385 (D. Neb. 1947); cases cited *supra* notes 99-100.

159. 391 F.2d at 564 n.8.

160. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 151 (S.D.N.Y. 1966).

Second Circuit reversed, reasoning that application of such a test would undermine a "primary function" of the class suit: to facilitate litigation of "claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group."[161]

This decision to ignore the representatives' financial interest in determining their adequacy as class representatives went unexplained in *Eisen*. At least one other court, however, was more candid, identifying the class attorney's fee as the reliable fuel for "good fight" prosecutions of small claims cases. As Judge Weinstein noted: "[A] major incentive to forceful prosecution is the substantial counsel fee plaintiff's attorney believes he may be awarded if he is successful."[162] While the courts recognized that a large financial stake in the litigation could provide additional incentive to the representatives to prosecute the class's claim,[163] the lack of a substantial individual claim was not considered critical when the class claim itself provided an incentive for vigorous prosecution by the representatives' attorney.[164] Although Professor Moore cautioned that "the new permissiveness has not yet reached the point where the normal party representative is purely a symbolic fiction . . . [and a] bona fide, adequate class representative is still

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161. 391 F.2d at 563.

162. Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968). Judge Weinstein noted in *Dolgow:*

> In contending that the size of the claims of the parties before the court should be given great weight in determining the question of adequacy of representation, the defendants assume that the plaintiff's force in prosecuting the action is proportionate to the amount they hope to recover. . . . The realities of the situation here and in the vast majority of class actions suggest that the amount of possible recovery by the class rather than by the individual plaintiffs furnishes the motivating force behind prosecution. . . . The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits. . . . Quite obviously, a major incentive to forceful prosecution is the substantial counsel fee plaintiff's attorney believes he may be awarded if he is successful.

Id. at 494-95.

In Rosado v. Wyman, 332 F. Supp. 1173 (E.D.N.Y. 1970), the plaintiffs' lawyers were employed by a non-profit public interest organization. Judge Weinstein noted that "[i]n the new kinds of litigation . . . the individual client's interest, as reflected in his payment for counsel, no longer is an appreciable factor in a decision to sue, to join others, or to conduct the litigation. . . ." *Id.* at 1194.

163. *See, e.g.,* Rodriguez v. Swank, 318 F. Supp. 289, 294 (N.D. Ill. 1970) (large economic stake insured diligent and thorough representation), *aff'd per curiam,* 403 U.S. 901 (1971); Korn v. Franchard Corp., 50 F.R.D. 57, 59 (S.D.N.Y. 1970) (determination of amount of class claim helps determine adequacy of representative), *appeal dismissed,* 443 F.2d 1301 (2d Cir. 1971).

164. *See* Vernon J. Rockler & Co., v. Graphic Enter., Inc., 52 F.R.D. 335, 344 (D. Minn. 1971) (counsel's motive to vigorously prosecute class's claims is a product of total possible recovery as well as individual interest of representation); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 515 (W.D. Pa. 1971) (lack of substantial interest by plaintiff irrelevant if court convinced counsel will vigorously prosecute class's rights), *rev'd on other grounds,* 496 F.2d 747 (3d Cir. 1974) (en banc); Epstein v. Weiss, 50 F.R.D. 387, 391 (E.D. La. 1970) (single plaintiff may represent class if other factors insure adequate representation).

required,"[165] the courts generally agreed that, to qualify as adequate representatives, the named party's stake in the litigation need be no more than was required for article III standing.[166]

Thus, after decades of experience with Rule 23, the courts had developed only a general approach for determining the adequacy of class representatives.[167] Nevertheless, the lack of systematic treatment or clear guidelines for assessing adequacy did not interfere with the utilization of the class device. Given the large number of class actions filed, there have not been many examples of great injustices done to absent class members by nefarious or incompetent class representation.[168] Cases like *Hansberry* were buried by history.

II. CLASS ACTION AND THE CIVIL RIGHTS REVOLUTION

In the 1960's the term "class action" became almost synonymous with

165. 3B J. MOORE & J. KENNEDY, *supra* note 65, ¶ 23.07[2], at 23-218 to -219; *see also In re* Goldchip Funding Co., 61 F.R.D. 592, 595 (M.D. Pa. 1974) (attorney who prosecutes class action with unfettered discretion becomes representative of class which is unacceptable because of possible conflict of interest).

166. In theory the client was responsible for the costs of the litigation. Under canon five of the Code of Professional Responsibility, an attorney could advance the costs of the litigation so long as the client remained ultimately liable. Disciplinary rule 5-103(B) of the Code provided:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence, provided the client remains willingly responsible.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980). Because costs were ultimately the client's responsibility, a few courts held that the financial ability of named plaintiffs to shoulder the costs of the class action had to be evaluated to determine their adequacy as representatives. *See* Held v. Missouri Pac. R.R., 64 F.R.D. 346, 350 (S.D. Tex. 1974) (plaintiff financially unable to bear cost of notice to class or to meet other expenses of litigation); National Auto Brokers v. General Motors Corp., 60 F.R.D. 476, 495 (S.D.N.Y. 1973) (class action dismissed because of unwillingness of plaintiff to pay for class notice). *But see* Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 383 (E.D. Pa. 1974) (resources of plaintiff representing class relevant but inquiry not required because of agreement by plaintiff's counsel to bear costs of suit).

But these decisions were limited to Rule 23(b)(3) class action cases in which notice had to be given before trial to allow absent class members to opt out of the suit. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-77 (1974) (Rule 23(c)(2) requires individual notice to all class members who can be identified with reasonable effort; plaintiff must bear the cost of notice to the class). No similar development occurred, however, with respect to other types of class actions where notice was not mandated. Even in Rule 23(b)(3) actions, courts required no affirmative showing of financial ability, and only addressed the issue when defendant claimed that the plaintiff could not afford to pay for notice.

167. *See* Note, *Developments*, *supra* note 24, at 1471-72. "[A]lthough federal courts have had to confront the question of adequacy of representation on a regular basis, the doctrine which has developed under Rule 23 hardly extends beyond an often empty requirement that class attorneys be competent and an unfocused hostility to classes whose members are in disagreement or in different situations." *Id.*

168. *See* cases cited *infra* note 438.

a kind of litigation which began to flourish early in the decade—the civil rights suit. The class suit became an instrument of social change. No longer was the class action merely a convenient vehicle for the aggregation of small claims which would not be likely to be litigated individually. Developments of law under the fourteenth amendment and various modern civil rights statutes affected judicial construction of Rule 23 generally, and the prerequisites of Rule 23(a) in particular. Because these developments, in turn, caused subsequent changes in the standard for determining adequacy of representation, it is necessary to review the history of class suits in the context of civil rights litigation.

Under the 1938 version of Rule 23, class suits were an accepted, if not frequently used,[169] device for attacking racial discrimination.[170] For example, a series of class actions were filed in the 1940's by black railroad workers under the Railway Labor Act, seeking to enjoin their exclusion from the industry by the segregated white railway unions.[171] As in other cases brought under the original Rule 23, there was some confusion as to whether civil rights suits fit within the true or spurious category.[172] But in order to allow the class members to enforce judgments intended to prohibit further discrimination, it was generally agreed that the actions should be classified as true class suits.[173]

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169. A number of the earliest cases attacking segregation on common carriers and in public universities were apparently not filed as class actions. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (equal protection required that black petitioner be admitted to state supported law school, rather than substantially unequal and separate black law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (fourteenth amendment bars descrimination against black law school applicant); McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151 (1914) (state's separate but equal accommodations requirement permitted under fourteenth amendment). The first reported class action filed to obtain redress under the equal protection clause of the fourteenth amendment was Wong Wai v. Williamson, 103 F. 1 (C.C.N.D. Cal. 1900), an action to enjoin enforcement of a municipal ordinance mandating the innoculation only of persons of Asiatic descent.

170. *See generally* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577 (1953) [hereinafter cited as Comment, *Class Action in Antisegregation*].

171. *See* Conley v. Gibson, 355 U.S. 41 (1957); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

172. Because the right to equal protection of the laws could be enforced without necessarily affecting the rights of non-joined persons of the plaintiffs' race, the right was theoretically several and the action thus of the spurious variety. *See* Brunson v. Board of Trustees, 311 F.2d 107, 109 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963) (school desegregation suit classified as spurious). But since decrees in "spurious" cases were binding only on those parties joined in the action, courts tended to disregard the classification scheme under original Rule 23 and indicated that decrees in desegregation cases would run in favor of all absentee members of the class. *See* Orleans Parish School Bd. v. Bush, 242 F.2d 156, 165-66 (5th Cir. 1957); Browder v. Gayle, 142 F. Supp. 707, 714 (M.D. Ala. 1956), *aff'd per curiam*, 352 U.S. 903 (1956); Frasier v. Board of Trustees, 134 F. Supp. 589, 593 (M.D.N.C. 1955), *aff'd per curiam*, 350 U.S. 979 (1956).

173. *See* System Fed'n No. 91 v. Reed, 180 F.2d 991, 997 (6th Cir. 1950); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 148 F.2d 403, 405 (4th Cir. 1945); *see*

The decision in *Brown v. Board of Education*[174] opened the floodgates for civil rights class actions. The decade following that decision brought with it hundreds of class actions attacking racial segregation in education,[175] transportation,[176] and public facilities,[177] as well as attacking the exclusion of blacks from the political process[178] and the professions.[179] These cases shared a common characteristic: The nature of the constitutional right being asserted made it almost impossible to separate individual relief from the relief sought on behalf of the class. For example, in *Potts v. Flax*,[180] a school desegregation suit, the defendants contended that the case was not an appropriate class action because the named plaintiffs had not shown that they wanted to seek relief for anyone besides their own children.[181] The Fifth Circuit treated the defendants' argument as essentially irrelevant. The court declared that the plaintiffs' attack was on the unconstitutional practice of racial discrimination and once such discrimination was found to exist, the court must order that it be discontinued. The court found that although the order might specifically name the plaintiff as the party not to be discriminated against, that decree must be read as applying to unnamed class members.[182] The court went on to state that even if class relief had not been sought, "the decree for all practical purposes would have been the same. . . ."[183] If any suit attacking a policy of discrimination was automatically a suit on behalf of a class, it made little sense to examine closely the representative party's qualifications, or to expend much effort determining into which

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also Comment, *Developments In the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 935 (1958) (injunction to one individual is not remedy to class); Comment, *Class Action in Antisegregation, supra* note 170, at 592 ("the remedy for unlawful segregation will be adequate only if a favorable decree is enforceable by any members of the class").

174. 347 U.S. 483 (1954). Each of the four cases decided in *Brown* was filed as a class action. *Id.* at 495; *see also* Brown v. Board of Educ., 349 U.S 294, 300-01 (1955) (reargument of relief granted in previous four cases).

175. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965); McNeese v. Board of Educ., 305 F.2d 783 (7th Cir. 1962); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955).

176. *See, e.g.*, Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958).

177. *See, e.g.*, Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965); Smith v. Holiday Inns of Am., Inc., 336 F.2d 630 (6th Cir. 1964); Cummings v. City of Charleston, 288 F.2d 817 (4th Cir. 1961).

178. *See, e.g.*, Sharp v. Lucky, 252 F.2d 910 (5th Cir. 1958); Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958).

179. *See, e.g.*, Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

180. 313 F.2d 284 (5th Cir. 1963).

181. *Id.* at 288. One of the named plaintiffs in *Potts* testified that he was bringing the suit for his own children and not for other negro students. The second plaintiff did not express any intent with regard to the class. *Id.*

182. *Id.* at 289.

183. *Id.* at 290.

category of class actions the case fell.[184] Thus, in the early civil rights class decisions there was little or no discussion of Rule 23.[185] A suit filed as a class action to enforce fourteenth amendment rights was perforce a class action. Such suits attacked simple, overt policies of racial segregation; thus, the decisions focused on the scope of the appropriate injunctive relief rather than on the merits of the constitutional claim. Courts found no occasion to address the troubling question of what binding effect an adverse determination on the merits would have on such a class.[186]

A. Across-the-Board Actions

The enactment of the 1964 Civil Rights Act[187] brought with it a new kind of civil rights suit. Such litigation, particularly under Title VII[188] of the Act, barring discrimination in employment, frequently did not concern overt policies of discrimination but instead required determination of whether particular actions of defendants were motivated by animus against the class. In addition, suits under the civil rights statutes involved different manifestations of discrimination, a fact that made them inherently more complex than their constitutional forebearers. The fourteenth amendment cases usually concerned a single policy with a single, readily-established harm to a class, such as school segregation. In contrast, a suit against an employer under Title VII alleging discrimination in the workplace, could involve a variety of claims, including discrimination in pay, job assignment, promotions, fringe benefits,

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184. In Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964), a suit to declare unconstitutional and enjoin enforcement of state statutes requiring racial segregation of public transportation facilities, the court of appeals stated: "We find it unnecessary to determine . . . whether this action was properly brought under Rule 23(a), for whether or not appellants may properly represent all Negroes similarly situated, the decree to which they are entitled is the same." 323 F.2d at 206; *cf.* Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958). In *Reddix*, a black voter who was struck from the voting rolls was not eligible to represent a class of similarly situated blacks because "[t]he fact that each voter must allege and prove the circumstances that might add up to an illegal purge, makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action." *Id.* at 938.

185. *See* cases cited *supra* notes 175-79.

186. *But see* Comment, *Class Action in Antisegregation*, *supra* note 170, at 591-92, arguing that the class should be bound only by a victory for the representative, not a defeat:

> One should not be bound without having had his day in court, and the unnamed members of the class have clearly not had theirs. Their adversary, however, has had an ample opportunity to present his case . . . [t]herefore, mutuality would seem to require that the class be bound only when it has no further need to litigate, that is, only when the decision is favorable to persons not before the court.

Id. The prevailing doctrine at that time, however, required mutuality of estoppel. *See* Z. CHAFEE, *supra* note 11, at 280.

187. 42 U.S.C. § 2000 (1982). The act prohibits discrimination on the basis of race in places of public accommodation, by public agencies, and by programs receiving federal financial assistance. The act also prohibits discrimination by employers on the basis of race, sex, and national origin.

188. 42 U.S.C. § 2000e (1982).

and hiring. The impact of these differences on the class action device itself was not immediately recognized. But even before the 1966 rules revision, the vast majority of courts had concluded that actions alleging race discrimination were appropriate for class treatment regardless of the form in which the discrimination was manifested.[189] In *Hall v. Werthan Bag Corp.*,[190] an early employment discrimination case,[191] the court explained the basis for this conclusion when it noted that "[r]acial discrimination is by definition a class discrimination."[192] The court observed that while the actual effects of a discriminatory policy might vary throughout a class, the entire class was threatened by such a discriminatory policy.[193]

When Rule 23 was revised, one of the new functional categories, the (b)(2) class, was included specifically to facilitate class actions in civil rights cases. The advisory committee cited nine cases as illustrative of proper class actions. All of the cases cited involved challenges to overt, state-imposed policies of racial segregation.[194] Although the cited cases involved the older, simpler kind of attacks on overt discrimination, Rule 23 was widely interpreted as authorizing class suits attacking non-overt forms of discrimination.[195] The courts promptly approved subsection (b)(2) classes for a wide variety of civil rights claims.[196]

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189. *See, e.g.*, Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965) (segregation of restaurant), *cert. denied*, 384 U.S. 929 (1966); Todd v. Joint Apprenticeship Comm., 233 F. Supp. 12 (N.D. Ill. 1963) (job placement discrimination), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Wood v. Hogan, 215 F. Supp. 53 (W.D. Va. 1963) (segregation of hospital patients); Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959) (challenge to state law requiring public employees to make public all organizational affiliations and prohibiting public employment of NAACP members), *rev'd on other grounds sub nom.* Shelton v. Tucker, 364 U.S. 479 (1960).

190. 251 F. Supp. 184 (M.D. Tenn. 1966).

191. *Hall* was the first reported case under Title VII.

192. 251 F. Supp. at 186.

193. *Id.* The court stated: "And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class." *Id.*

194. *Advisory Committee Note, supra* note 117, at 102. Seven of the nine cases involved racial segregation of public educational institutions. The remaining two cases were the Supreme Court's decision in Bailey v. Patterson, 369 U.S. 31 (1962), and the Fifth Circuit's decision on remand, Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), which approved the class as a device for challenging laws requiring segregation in public transit facilities. The committee explained that "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one of a few members of the class, provided it is based on grounds which have general application to the class." *Advisory Committee Note, supra* note 117, at 102.

195. "Under present Rule 23(b)(2) there is no doubt that a class action would be proper when a policy that is nondiscriminatory on its face has been applied in a discriminatory fashion to an identifiable class." 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1752, at 522.

196. *See, e.g.*, Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 768 (8th Cir. 1971) (employment); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 n.42 (2d Cir. 1968) (housing discrimination); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 300 (E.D. La. 1970) (police practices); Doe v. Shapiro, 302 F. Supp. 761, 762 n.3 (D. Conn. 1969) (public welfare regulations), *appeal dismissed*, 396 U.S. 488 (1970).

Not long after the 1966 revision, however, courts were faced with a complex type of class suit attacking different kinds of discriminatory actions, none of which uniformly applied to all class members. More often than not, the class representative could claim only to have been the victim of one kind of discriminatory act. The justification for allowing such cases to proceed as class actions was that a common discriminatory policy formed the basis for all of the various actions. Thus, under Rule 23(b)(2), the defendant had acted or failed to act on grounds that generally applied to the class. The chief catalyst for this development was the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*[197]

In *Johnson,* a discharged black employee sought to represent a class of "all other similarly situated Negroes seeking equal employment opportunities."[198] Johnson alleged that his former employer had discriminated on the basis of race in virtually all aspects of its operation, including hiring, discharge, promotion and maintenance of segregated facilities. The district court restricted the class to those persons discharged because of their race; however, the Fifth Circuit reversed. Characterizing the suit as an across-the-board attack on illegal employment practices, the Fifth Circuit reasoned that the alleged underlying policy of racial discrimination was sufficiently common to, and typical of, the claims of all class members to permit joinder of all the claims.[199] The court noted that this decision did not mean that the plaintiff was necessarily an adequate representative of the class. The appellate court commented that the district court, on remand, could conduct an evidentiary hearing on the issue under the *Eisen* standards.[200] What was plain from the *Johnson* decision was that the factual and legal differences between the named plaintiff's claims arising from his discharge and the claims made on behalf of the non-discharged class members, would not render him an indequate class representative. Judge Godbold, in a concurring opinion, voiced the concern that interests of absent class members might be difficult to protect in such a broadly based class of employees located in facilities that were spread over a multi-state area.[201] That concern, however, did not frequently surface in subsequent decisions.

In a series of cases following *Johnson,* the Fifth Circuit continued to apply the across-the-board approach to class certification in civil rights cases, and made it clear that plaintiffs would be allowed to litigate class claims for relief to which they, individually, would not necessarily be entitled.[202] Typical

197. 417 F.2d 1122 (5th Cir. 1969).

198. *Id.* at 1123. In a concurring opinion, Judge Godbold complained that the plaintiff sought to represent a class "as broad as his ingenuity and syntax will allow." *Id.* at 1126 (Godbold, J., concurring). The majority concluded from the nature of the relief sought that the class should include all current and former black employees of the defendant. *Id.* at 1124.

199. *Id.* at 1124.

200. *Id.* at 1124-25.

201. *Id.* at 1126-27 (Godbold, J., concurring).

202. *See* Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975) (suit to correct unconstitutional prison conditions); Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir. 1974) (former employee allowed to bring a racial discrimination claim for class of present and future employees

of these cases was *Long v. Sapp,*[203] a case in which a former employee alleged that her discharge resulted from both racial and sexual discrimination. The plaintiff sought to represent a class composed of "all black persons who have applied for employment with the defendants or who would have applied for employment had the defendants not practiced racial discrimination in employment and recruiting, and all black persons terminated by the defendants."[204] The court dismissed the class claim on the theory that the plaintiff had not suffered the same kind of discrimination as her class.[205] The Fifth Circuit reversed. This class ruling was all the more dramatic because the court affirmed the dismissal of the plaintiff's individual claim of race discrimination.[206] According to the court of appeals, the plaintiff had demonstrated the necessary "nexus" with the proposed class victims to represent them because she was black and because she alleged that she had suffered from racial discrimination. As in *Johnson,* the court cautioned that its ruling was not a determination of the plaintiff's fitness to represent the class adequately under Rule 23(a)(4).[207] No explanation was given, however, as to what effect, if any, the plaintiff's status as a non-injured claimant should have on the adequacy determination.

A majority of the circuits either expressly or effectively adopted the across-the-board approach to class certification in civil rights cases.[208] Implicit in all

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despite fact that her own claim was not a winning one); Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970) (employees allowed to challenge hiring as well as internal personnel policies).

203. 502 F.2d 34 (5th Cir. 1974).

204. *Id.* at 40.

205. The district court delayed ruling on the propriety of the class action until the conclusion of the trial. The final decision dismissed the plaintiff's individual case and the class's claim. *Id.* at 41. With respect to the class, the court reasoned that the plaintiff could not represent those blacks who had applied for employment and had been rejected, or those who would have applied were it not for the allegedly discriminatory policy, because plaintiff had in the past held jobs with the employer and it could not be said she would not be hired again. The court refused to continue the action on behalf of terminated black employees because it foresaw the possibility of multiple suits requiring individual attention. *Id.*

206. The district court's finding that the plaintiff was not terminated for racial reasons was affirmed. 502 F.2d at 37. The sex discrimination claim was remanded for reconsideration. *Id.* at 38-40.

207. *Id.*

208. *See* Donaldson v. Pillsbury Co., 554 F.2d 825, 829-32 (8th Cir.) (employee victimized by sex and race discrimination can also represent those not hired), *cert. denied,* 434 U.S. 856 (1977); Senter v. General Motors Corp., 532 F.2d 511, 523-24 (6th Cir.) (charges of racial discrimination essentially similar in spite of varying circumstances), *cert. denied,* 429 U.S. 870 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.) (employees who resigned could continue to represent current employees), *cert. denied,* 421 U.S. 1011 (1975); Barnett v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975) (plaintiff can challenge racial discrimination on behalf of employees and those denied employment); Reed v. Arlington Hotel Co., 476 F.2d 721, 722-23 (8th Cir.) (discharged employees suffered same discrimination as those retained), *cert. denied,* 414 U.S. 854 (1973); Tipler v. E.I. DuPont deNemours & Co., 443 F.2d 125, 130 (6th Cir. 1971) (discharged employee had standing to challenge all discriminatory practices of defendant); *see also* Note, *Developments in the Law—Employment Discrimination and Title*

these cases was a conclusion that across-the-board attacks satisfied not only the Rule 23(b)(2) requirement that the defendant had acted on grounds "generally applicable to the class," but also fulfilled the subsection (a) prerequisites of commonality and typicality.[209] Regarding the typicality prerequisite, courts only required plaintiffs to demonstrate a nexus or link between their claims and those of the class.[210] In practice, this requirement was satisfied by an allegation that a common discriminatory policy formed the basis for the challenged acts. The same allegation easily satisfied the common question of law or fact requirement.[211] This liberalized application of Rule 23(a) was frequently justified as necessary to insure that all whose constitutional or statutory civil rights had been infringed received a remedy.[212] In Title VII cases, the broad approach to Rule 23(a) found support in the legislative purposes of the Civil Rights Act.[213] In *Wright*

VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1219-21 (1971) (two requirements must be satisfied to maintain class action under Title VII: requisites of Rule 23 must be met and issues must have been raised before EEOC); *cf.* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975) (holding that an across-the-board approach does not exempt a plaintiff from the requirement of Rule 23(a)).

209. *See* Foster v. Sparks, 506 F.2d 805, 809 (5th Cir. 1975); Presseisen v. Swarthmore College, 71 F.R.D. 34, 42 (E.D. Pa. 1976); Piva v. Xerox Corp., 70 F.R.D. 378, 386 (N.D. Cal. 1975).

210. *See* Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974); cases cited *supra* note 209.

211. *See* Presseisen v. Swarthmore College, 71 F.R.D. 34, 45 (E.D. Pa. 1976); Piva v. Xerox Corp., 70 F.R.D. 378, 385 (N.D. Cal. 1975).

212. *See, e.g.*, Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975) (court effectively adopted across-the-board approach in furtherance of judicial goal of enabling litigation to proceed with maximum effectiveness); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971) (court expressly adopted across-the-board approach because retention of successor party plaintiff facilitated contacts with original class); Moss v. Lane Co., 50 F.R.D. 122, 125 (W.D. Va. 1970) (liberal interpretation of class requirements preferred in civil rights cases since maintenance of class is always subject to modifications during trial), *aff'd in part*, 471 F.2d 853 (4th Cir. 1973); *see also* 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1771, at 663 ("The very structure of the claims asserted and the relief requested in Rule 23(b)(2) suits does suggest that a less stringent application of Rule 23(c) is appropriate.").

213. Title VII was amended in 1972. 42 U.S.C. § 2000e-5(g) (1964), *amended by* 42 U.S.C. § 2000e-5(g) (Supp. II 1972). During the debates on the amendments, Congress rejected a provision that would have limited class actions and expressly approved the judicial pattern of liberal class certification of Title VII class actions to permit inclusion of class claims extending beyond those of the individual plaintiff:

> In establishing the enforcement provisions under this subsection . . . it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The Courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief.

Equal Employment Opportunity Act Amendments, Pub. L. No. 92-261, 86 Stat. 13 (1972)

v. Stone Container Corp.,[214] for example, the court stated that "Rule 23 should be liberally construed to effectuate the remedial policy of Title VII. . . ."[215] Similarly, in *Hutchings v. United States Industries, Inc.*,[216] the Fifth Circuit explained that "the purpose of Title VII proceedings was to vindicate the policies of the Act and not merely to afford private relief to an individual employee."[217]

Across-the-board cases thus shared two distinctive characteristics. First, the status of the named plaintiff was likely to be different from at least some class members. Second, at least part of the relief sought for the class was not likely to be of immediate benefit to the named plaintiff. The plaintiff in *Long*, for example, was hardly in a position to benefit directly from relief afforded class members who had not applied for work because of discrimination in recruiting. If one of the policies behind Rule 23(a) was to obtain assurance that the representative's self-interest would encourage vigorous prosecution of class claims, the liberalization of the typicality and commonality requirements should have sparked increased attention to the only remaining source of "good fight" insurance: the adequacy of the representative "team" of plaintiff and attorney. That did not happen. Despite the court's caution in *Johnson* that the across-the-board approach did not relieve the representative of the burden of establishing representative adequacy,[218] courts continued to demonstrate a pro forma attitude toward this determination.[219] Thus, findings on adequacy were generally limited to perfunctory comments made without evidentiary support, such as stating that there were no conflicts of interest between the representative and the class and that the plaintiff's attorney was competent.[220]

An important question was left unanswered by this pro forma attitude toward adequacy: What would happen to the class if the representative's

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(codified at 42 U.S.C. § 2000e-5(g) (1972)), *reprinted in* BUREAU OF NATIONAL AFFAIRS, SECTION-BY-SECTION ANALYSIS, HOUSE-SENATE CONFERENCE COMMITTEE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1947 (1973).

214. 524 F.2d 1058 (8th Cir. 1975).

215. *Id.* at 1061-62.

216. 428 F.2d 303 (5th Cir. 1970).

217. *Id.* at 311.

218. *See supra* text accompanying notes 199-201.

219. *See, e.g.*, Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); Crockett v. Green, 534 F.2d 715, 717-18 (7th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 339, 341 (10th Cir. 1975); Foster v. Sparks, 506 F.2d 805, 809 (5th Cir. 1975).

220. *See, e.g.*, Lamphere v. Brown Univ., 553 F.2d 714, 718-19 (1st Cir. 1977); Grogg v. General Motors Corp., 72 F.R.D. 523, 529-30 (S.D.N.Y. 1976); Women's Comm. for Equal Employment Opportunity v. NBC, Inc., 71 F.R.D. 666, 670 (S.D.N.Y. 1976). A few district courts seemed to abandon formal certification altogether in civil rights cases and allowed cases to go to trial on class issues without any prior certification. *See* Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979); Horn v. Associated Wholesale Groceries, Inc., 555 F.2d 270 (10th Cir. 1977); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); *see also* Gurule v. Wilson, 635 F.2d 782, 788-90 (10th Cir. 1980) (affirming post-judgment certification of class).

individual claim disappeared after litigation was commenced? It was settled that a plaintiff's failure to allege any real, personal, or immediately threatened injury would result in dismissal of both the individual and class aspects of the complaint. For example, in *Bailey v. Patterson,*[221] the Supreme Court held that plaintiffs could not seek to enjoin criminal prosecution of others for violating the Jim Crow laws concerning public transportation facilities unless they themselves were being prosecuted—they could not "represent a class of whom they [were] not a part." The Court reached the same result in *O'Shea v. Littleton*[222] on article III grounds: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."[223] But what if the claim of the representative party, who had established a justiciable controversy and had adequately pled a class action under Rule 23, later became moot or was lost on the merits?

An answer to this question was formulated in the so-called "headless" class action cases. As the class device was increasingly used as a means of changing conditions in education, political affairs, and the work place, it was not unusual for the representative's claim to disappear or become moot before the merits of the class's claim were decided. Perhaps the earliest examples occured in school desegregation litigation when the representative's children either graduated or transferred out of the defendant school system before final judgment was entered. As a general rule, courts refused to terminate the litigation on the pragmatic ground that dismissal would contribute to the continued denial of equal protection to the absent class members.[224]

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221. 369 U.S 31, 32-33 (1962). In *Bailey,* the plaintiffs attacked the constitutionality of the statutes and sought a declaratory judgment. Although the Supreme Court held that the plaintiffs could not represent the class for injunctive relief purposes, its ruling did not suggest that the plaintiffs were not appropriate representatives of the class of blacks affected by the statutes for purposes of seeking declaratory relief. On remand, the Fifth Circuit held that the plaintiffs could not prosecute a class action for such relief. *Bailey,* 206 F. Supp. 67, 69 (S.D. Miss. 1962).

222. 414 U.S. 488 (1974).

223. *Id.* at 494. The plaintiffs in *O'Shea* filed suit on behalf of all black citizens of Cairo, Illinois, alleging discriminatory and unconstitutional administration of the criminal justice system of the city. *Id.* at 490-92. At the time the suit was filed, however, none of the named plaintiffs was either serving an allegedly illegal sentence or awaiting trial. Finding no case or controversy, the Court made no determination concerning the maintainability of the class action, but suggested that because of the diverse nature of relief requested it might be unmanageable. *Id.* at 494-95 n.3.

224. *See, e.g.,* Singleton v. Board of Comm'rs of State Insts., 356 F.2d 771, 773 (5th Cir. 1966) ("[o]nly permanent—demonstrably permanent—desegregation of the schools would render this case moot"); Buckner v. County School Bd., 332 F.2d 452, 453 (4th Cir. 1964); McSwain v. Board of Educ., 138 F. Supp. 570, 571-72 (E.D. Tenn. 1956); *see also* Rackley v. Board of Trustees, 238 F. Supp. 512, 515 (E.D.S.C. 1965) (fact that plaintiff had to move from county did not render class action to enjoin hospital from enforcing policy of racial segregation moot); 7 C. WRIGHT & A. MILLER, *supra* note 120, § 1776, at 42 ("fact that some members of the class no longer are subject to the alleged discrimination does not destroy the existence of a controversy between defendant and remaining class members; . . . to hold otherwise would

Although these cases were difficult to explain in terms of the language of Rule 23, this tolerance of mootness was easily understood. Courts could see from the outset of the litigation that illegal segregation was occurring, and class-wide relief was almost always granted.

A more difficult problem was posed when the representative's claim became moot or was lost in a case where victory for the class was not foreordained. In *Jenkins v. United Gas Corp.*,[225] the Fifth Circuit held that the mootness of the named plaintiff's personal suit[226] did not necessitate the dismissal of the class action. The court stated:

> Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. Consequently, while we do not here hold that such a "private Attorney General" is powerless absent court approval to dismiss his suit, . . . the court, over the suitor's protest, may not do it for him without ever judicially resolving by appropriate means (summary judgment, trial, etc.) the controverted issue of employer unlawful discrimination.[227]

The court also indicated that its decision was based on the pragmatic view that any contrary result would allow an employer an easy "means of continuing its former ways. . . ."[228] The court, however, did not explain how the employee continued to be an adequate class representative after his own claim became moot.[229] Subsequently, the Fifth Circuit extended the rationale of *Jenkins* to a case in which the named plaintiff became ineligible for further relief because his individual suit was lost on the merits.

In *Huff v. N.D. Cass Co.*,[230] a former employee claimed that his discharge was racially motivated and filed an across-the-board suit on behalf of a class of current, former, and future employees of the defendant company. After conducting a preliminary hearing to determine whether the plaintiff was an adequate representative of the class, the court found that his discharge was not discriminatory and concluded that he was not a member of the class

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enable defendant to circumvent the public policies against discrimination on the grounds of race or sex by 'buying off' or satisfying individual claimants").

225. 400 F.2d 28 (5th Cir. 1968).

226. The plaintiff in *Jenkins* alleged that he had been denied a promotion because of his race. *Id.* He filed an action on behalf of all black employees alleging plant-wide racial discrimination "which took its toll of Employee and his group principally in denial of promotion to the position of Serviceman." *Id.* at 31. A few weeks after the suit was filed, Jenkins was offered, and accepted, the desired promotion. The defendant moved for dismissal and the trial court "without ever making any factual inquiry into the broad charges affecting others system-wide entered an outright judgment of dismissal." *Id.*

227. *Id.* at 33.

228. *Id.*

229. The courts' failure to discuss plaintiff's ability to continue to prosecute the class claim perhaps resulted from the fact that his individual claim was not entirely moot. He still had an unsatisfied claim for back pay and injunctive relief "as a protection against a repetition of such conduct in the future." *Id.* Nothing in the courts' opinions suggested, however, that the viability of the class claim hinged on Jenkin's having a continued live stake in the suit.

230. 485 F.2d 710 (5th Cir. 1973) (en banc).

of alleged victims of discrimination and therefore could not adequately protect its interests. Accordingly, the entire case was dismissed. The Fifth Circuit reversed in part.[231] While upholding the dismissal of the plaintiff's personal claim, the court held that "a class plaintiff who otherwise meets the demands of 23(a) and (b) should not be found to be disqualified solely by an advance determination that his claim is predictably not a winning claim and that, therefore, he cannot adequately represent the class as mandated by 23(a)(4)."[232] In effect, the court held that the plaintiff's likelihood of success on the merits of his personal claim was neither a proper test for determining his membership in the class nor a conclusive factor in the determination of his adequacy as a representative. Although contrary authority existed,[233] most courts either explicitly or effectively followed *Huff* and *Jenkins*.[234] The rationale of all the decisions was the same as that which supported across-the-board actions generally: the public importance of affording relief to persons whose constitutional or statutory civil rights had been violated.[235]

Implicit in these decisions was the conclusion that a representative without a live individual claim could adequately represent the interests of the class and carry the class claim to conclusion without having any personal stake in the litigation. But the opinions made clear only that a court could not disqualify a representative *solely* because of loss or mootness of the individual claim.[236] The opinions provided no guidance whatsoever as to how a court should make the adequacy determination and what affect, if any, the lack

231. On the initial appeal, the court of appeals affirmed all aspects of the district court's decision. *Huff*, 468 F.2d 172 (5th Cir. 1972). The court subsequently granted a rehearing en banc and reversed the dismissal of the class claims. *Huff*, 485 F.2d 710 (5th Cir. 1973) (en banc).

232. 485 F.2d at 714.

233. *See* Geraci v. Treuchtlinger, 487 F.2d 590, 592 (2d Cir. 1973); Spriggs v. Wilson, 467 F.2d 382, 384-85 (D.C. Cir. 1972); Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972).

234. *See, e.g.*, Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973) (standing to challenge discriminatory practices does not depend on merits of representative's personal action); Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973) (dismissal of individual suit does not destroy representative status if plaintiff is member of class at initiation of suit); Rivera v. Freeman, 469 F.2d 1159 (9th Cir. 1972) (merits of class action does not depend on merits of representative's suit); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.) (class not deprived of remedy because plaintiff's action dismissed), *cert. denied*, 409 U.S. 982 (1972); *see also* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 590-97 (discussing *Huff* and *Jenkins* decisions).

235. In Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1380 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972), the court noted: "While Brown has not proved his own Title VII claim, the class of employees he represents is not for this reason deprived of a remedy." *See also* Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968) (subsequent promotion of class representative does not eliminate standing).

236. The court in *Huff* distinguished between a plaintiff who was unable to prove that he was the victim of discrimination and a plaintiff who sought to represent a group of employees even though he had never been employed by the defendant. 485 F.2d at 714. In the latter case, "the court could lay bare at a preliminary stage this fact . . . and, having done so, conclude plaintiff was not a proper representative because he lacked the nexus with the class

of an individual claim should have on that determination.[237] For courts whose sole justification for stretching Rule 23(a) was to provide relief to absentee victims of discrimination, the failure to discuss how such class members should be protected in practice was an exceedingly peculiar lapse.

While the courts developed no systematic approach to the determination of representational adequacy in across-the-board, headless, or other kinds of class actions, they were forced to face a related problem that potentially existed in all class actions. The problem was that the representative team, the named plaintiffs and their attorney, could not always agree on what was in the best interest of the class. In such a case, who was the appropriate decision-maker for the class? The problem in making this determination tended to manifest itself in two circumstances: where requested class relief, either in whole or in part, had been denied and the named plaintiffs and the attorney disagreed over whether to appeal; and where the attorney and the representatives could not agree on whether a settlement was in the best interest of the class. In a non-class action the roles of attorney and client are relatively well defined. Although the attorney has some flexibility in making tactical decisions in litigation without consulting the client, the attorney must defer to the client's wishes on major decisions.[238] The courts recognized, however, that the traditional attorney-client relationships could not be imported wholesale into the class context by treating the named plaintiffs as the sole arbiters of the class interests. If the class attorney treated the named plaintiff as the exclusive voice of the class, the interests of the class members might be ignored or sacrificed.[239] Thus, the named plaintiffs' decision not to appeal because of a favorable ruling on their individual claim did not relieve the class attorney of the obligation to appeal a denial of relief to the class.[240] The class attorney was not at liberty, however, to disregard the desires of the named plaintiffs.

In *Pettway v. American Cast Iron Pipe Co.*,[241] the named plaintiffs wanted to appeal a denial of back pay to part of the class. Despite the plaintiffs' desire, the class attorney refused because of an apparently good faith belief that such an appeal would jeopardize other portions of the decree that were favorable to the entire class.[242] The court refused to allow substitution of

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and its interests and claims which is embraced in the various requirements of 23(a) and (b)." *Id.*

237. In *Huff*, for example, the court remanded with the admonition that the district court must:

> review the facts developed at the original hearing, supplemented to the extent, if any, that appears to the Court to be appropriate, and, applying the correct legal standard, decide whether plaintiff has the nexus required by Rule 23 to permit him to maintain the class action (omitting, of course, that plaintiff had a "losing" claim).

Id.

238. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 & EC 7-1, 7-7, 7-9 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) comment (1983).

239. *See* Gonzales v. Cassidy, 474 F.2d 67, 75-76 (5th Cir. 1973); Note, *Developments, supra* note 24, at 1592-95.

240. Gonzales v. Cassidy, 474 F.2d 67, 76 (5th Cir. 1973).

241. 576 F.2d 1157 (5th Cir. 1978).

242. *Id.* at 1175 n.17, 1180 n.24.

counsel for the purpose of taking an appeal on behalf of the class. The Fifth Circuit acknowledged that "no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged." Nonetheless, the court expressed the view that the class attorney could not allow decisions on behalf of the class to rest exclusively with the named plaintiffs, including the decision of whether or not to appeal.[243] The class counsel could not, however, ignore the wishes of the class representatives in such fundamental decisions.[244] The plaintiffs in *Pettway* were allowed to appeal on the merits of the class claim [245] because of the history of "excellent representation" by the plaintiffs during the ten-year history of the case, the record of widespread dissatisfaction with the district court's judgment, and the court's own conclusion that the appeal was not frivolous. The court's opinion emphasized that the result was dependent on the unique facts of the case and that the class attorney was in fact obligated not to blindly comply with the directions of named plaintiffs.[246]

Under Rule 23(e), a class claim cannot be settled without approval of the court and notice to class members.[247] The courts have uniformly held that fairness to the class, not the consent of named class representatives, is the condition for such approval.[248] In *Parker v. Anderson,*[249] the Fifth Circuit

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243. *Id.* at 1176-77.

244. *Id.* at 1178-80.

245. *Id.* at 1216.

246. The court stated:

> The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of the majority, the attorney's views must be accorded great weight, and the trial judge's decision to ratify the attorney's action will seldom be overturned.

Id.

247. Rule 23(e) provides:

> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FED. R. CIV. P. 23(e).

248. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978); *see also* Kincade v. General Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (because of unique nature of the attorney-client relationship in a class action, cases holding that attorney cannot settle case without authorizations of client are simply inapplicable); Flinn v. FMC Corp., 528 F.2d 1169, 1171 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) (assent of class plaintiffs not essential to settlement of class claim provided court finds it fair and reasonable); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir.) (disapproval of settlement compelling named plaintiffs to abandon claims must rest on specific rights asserted by the class), *cert. denied*, 419 U.S. 900 (1974); Robertson v. National Basketball Ass'n, 72 F.R.D. 64, 70-71 (S.D.N.Y. 1976) (where proposed settlement was fair and reasonable, objectors, even named plaintiffs, would not be allowed discovery to assure its reasonableness); Purcell v. Keane, 54 F.R.D. 455, 460 (E.D. Pa. 1972) (court should not approve settlement which is inadequate on its face).

249. 667 F.2d 1204 (5th Cir. 1982).

explained that the rationale behind such holdings is that "the named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands."[250] Thus, despite the objection of those persons who originally retained the class attorney, the attorney has an obligation to recommend a proposed settlement to the court if doing so is in the best interests of the class.[251]

The common thread in these cases where the named plaintiff and the attorney disagreed was the independent obligation of class counsel to protect the interests of the class, an obligation which could not be shifted to the named representatives. As the court in *Parker* noted, "[t]he fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs."[252] This line of authority made it all the more important for the courts to develop a systematic method of monitoring the actual performance of class counsel in those cases where the named representatives' interests and those of the class were not identical. Unfortunately, no such development occurred.

B. The Article III Cases

While the lower courts were in the process of broadly construing Rule 23 to facilitate enforcement of the civil rights statutes, the Supreme Court embarked on a series of cases which addressed the problem of the headless class from a different perspective—that of the "case or controversy" requirement of article III. In *Sosna v. Iowa,*[253] the plaintiff challenged the constitutionality of the state's one-year residency requirement for divorce. The district court certified the suit as a proper class action under Rule 23 and ruled against the plaintiff on the merits. By the time the case reached the Supreme Court, the plaintiff had satisfied the Iowa residency requirement and had obtained a divorce in another state.[254] Although the named plaintiff no longer had a personal stake in the outcome, the Court held that "when the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the plaintiff]."[255] The case or controversy requirement of article III was satisfied by the live claim of class members represented by the named plaintiff, even though the claim of the named plaintiff had become moot.[256] The Court recognized that the existence of a live controversy between class members and the defendants would not

250. *Id.* at 1211.
251. *Id.* at 1204; Kincaid v. General Tire & Rubber Co., 635 F.2d 501, 501 (5th Cir. 1981).
252. 667 F.2d at 1211.
253. 419 U.S. 393 (1975).
254. *Id.* at 398 n.7.
255. *Id.* at 399.
256. *Id.* at 402.

automatically establish that the named plaintiff was an adequate representative of the class under Rule 23. The Court, however, did find that representation was proper because there was no conflict between the interests of class members and the relief sought, and also because the class interests had been "competently urged" in the lower court.[257]

In *Gerstein v. Pugh*,[258] the Court similarly upheld class treatment in a case challenging pretrial detention conditions, even though it was assumed that the named plaintiffs were no longer in custody at the time the class was certified.[259] The Court recognized a live class claim because the continued existence of a class of persons experiencing the deprivation was certain.[260]

In both *Sosna* and *Gerstein* the Court justified its view that article III requirements could be met by the class controversy itself on the ground that the issues involved were "capable of repetition, yet evading review," an exception to the general doctrine of mootness.[261] But in *Franks v. Bowman Transportation Co.*,[262] the Court held that a class of employees had standing to continue to litigate a partial denial of relief, even though their representative had been discharged for cause.[263] Here the nature of the claim was certainly not "capable of repetition, yet evading review."[264] The Court explained that such a condition was only one of the policy considerations to be taken into account in determining article III standing. The adversarial relationship necessary to a case or controversy existed because of the class members' continued desire for the relief sought and the presence of competent counsel to aid in securing relief.[265]

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257. *Id.* at 403.

258. 420 U.S. 103 (1975).

259. *Id.* at 110-11 n.11.

260. *Id.*

261. *Gerstein*, 420 U.S. at 110 n.11; *Sosna*, 419 U.S. at 399-401. *But see* Chayes, *Foreward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 40 (1982) (noting that *Sosna* did not truly fit the "capable of repetition" test because neither Sosna nor members of her class were likely to suffer repeated applications of the durational residency requirement).

262. 424 U.S. 747 (1976).

263. The district court in *Franks* found that the employer had discriminated against a subclass of black applicants for over-the-road truck driver positions and ordered the company to give priority consideration to class members in filling future vacancies. The court, however, declined to grant other relief including back pay and retroactive seniority to class members who were hired under the injunction. *Id.* at 751. Plaintiff-intervenor Lee, the only representative of the subclass, had been employed as a driver but was discharged before the case came to trial. The district court found that Lee had been discriminated against when the defendant originally refused to hire him but that his discharge had been for non-racial reasons. *Id.* at 752. He was then awarded back pay for the initial refusal to hire. *Id.* The court of appeals affirmed both the class relief awarded by the district court and the finding that Lee's discharge claim was without merit. Franks v. Bowman Transp. Co., 495 F.2d 398, 406 (5th Cir. 1974). Thus, by the time the case reached the Supreme Court, Lee had been awarded all the relief he was entitled to, was ineligible for further employment with the defendant, and had no personal stake in the outcome of the litigation.

264. *See supra* note 261 and accompanying text.

265. 424 U.S. at 756 n.8.

It is true that *Sosna, Gerstein,* and *Franks* were all cases in which the Supreme Court appeared eager to reach the merits of the claims.[266] But what the Court was plainly saying in all three cases was that a class did not need a representative who was motivated by a live claim in order to be adequately protected within the meaning of Rule 23(a). The obvious implication was that a class could be adequately represented by a sufficiently motivated, competent attorney.[267] This policy judgment was given further confirmation in *United States Parole Commission v. Geraghty.*[268]

In *Geraghty,* the Court held that a named plaintiff could appeal the denial of class certification even after his individual claim became moot. A federal prison inmate challenged the validity of parole release guidelines on behalf of a class of federal prisoners who were, or would become, eligible for parole. The district court denied class certification,[269] and granted summary judgment for the defendants on all claims.[270] Geraghty appealed on behalf of the class but, because he had served out his sentence, he was released before the appeal could be heard.[271] Justice Blackmun found two class claims presented for resolution: the class claim on the merits and the claim that the class should be certified. While Geraghty's claim on the merits was moot, he still retained a personal stake in having the class certified.[272] This stake was based on the right of a proposed class representative to have a class certified if the prerequisites of Rule 23 were satisfied. Justice Blackmun candidly admitted that this right was "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."[273] Presumably, the Court believed that

266. It has been frequently suggested that the Supreme Court only finds a standing problem when it is unwilling to decide the merits of the case. *See* WARTH v. SELDIN, 422 U.S. 490, 519 (1975) (Brennan, J., dissenting). "While the Court gives lip-service to the principle, oft-repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal,' in fact the [majority] opinion . . . can be explained only by an indefensible hostility to the claims on the merits." *Id.* at 520 (Brennan, J., dissenting); *see also* Tushnet, *The New Law of Standing: A Plea for Abandonment,* 62 CORNELL L. REV. 663, 664 (1977) ("Decisions on questions of standing are concealed decisions on the merits of the underlying . . . claim.")

267. *See* Note, *Class Standing and the Class Representative,* 94 HARV. L. REV. 1637, 1642-47 (1981) [hereinafter cited as Note, *Class Representative*].

268. 445 U.S. 388 (1980).

269. Geraghty v. United States Parole Comm'n, 429 F. Supp. 737, 740-41 (M.D. Pa. 1977). The district judge found that some of Geraghty's claim had no class-wide applicability and assumed an intra-class conflict existed because some class members might benefit from the parole guidelines. *Id.*

270. *Id.*

271. The Third Circuit reversed, reasoning that under *Sosna* the action would not have become moot if a class had been certified. Geraghty v. United States Parole Comm'n, 579 F.2d 238, 248-52 (3d Cir. 1978). The court concluded that an erroneous denial of certification should not lead to a different result. *Id.* The court of appeals remanded the case for reconsideration because it disagreed with the district court's conclusion that the class was inappropriate. *Id.* at 267.

272. 445 U.S. at 402.

273. *Id.* at 403. On the same day that the Court decided *Geraghty,* it ruled in Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980), that two named plaintiffs could appeal a denial of class certification even though they had been tendered the full amount of their personal

non-economic social goals would supply a sufficient incentive to the proposed representative to make the litigation over the certification issue concrete and sharply presented.[274] Just as the Court had done in *Sosna*,[275] Justice Blackmun was careful to note that the finding of a live controversy did not dictate a finding that Geraghty was entitled to represent the class if it was certified.[276] The import of the decision was clear: The mootness of Geraghty's own claim neither prevented him from seeking class certification, nor necessarily disqualified him as a class representative after certification. Vigorous advocacy by the representative and the representative's attorney could thus satisfy the case and controversy requirement of article III *and* the representational requirement of Rule 23.

The *Sosna-Geraghty* line of authority, although prompted by article III concerns rather than by the necessity of construing Rule 23, was consistent with the rationale of the across-the-board approach to class certification. Just as a class representative without any personal stake could satisfy the case or controversy requirement, a named plaintiff with some personal stake could qualify as a representative under Rule 23(a), even though the representative's claim was not coterminous with the class's claims. In both areas, the courts recognized that an important question to be addressed was whether

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claims by the defendant. The court seemed to have rested its decision on the named plaintiffs' assertions of a cognizable economic interest throughout the litigation: a "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in [the] litigation." *Id.* at 334 n.6. This desire "supplied the personal stake" required by article III. *Id.* at 337. In contrast, in *Geraghty* the named plaintiff at no point alleged any personal interest—economic or otherwise—in the certification question. 445 U.S. at 420 (Powell, J., dissenting).

274. 445 U.S. at 403. The *Geraghty* Court stated:

> In Sosna v. Iowa, 419 U.S. 393 (1975), it was recognized that a named plaintiff whose claim on the merits expires after class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

Geraghty, 445 U.S. at 404; *see also* Note, *Class Representative*, *supra* note 267, at 1650-52 (arguing that *Geraghty* abolishes the personal stake requirement in the class action context).

275. *See supra* notes 253-57 and accompanying text.

276. The *Geraghty* Court stated:

> We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class has as yet been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate.

445 U.S. at 407.

For an example of a case that is difficult to distinguish from the *Sosna-Geraghty* line of cases, in which the Court obviously did not want to decide the merits, see Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975). In *Jacobs*, students involved in the publication of school newspapers filed a class action challenging certain actions by the board which allegedly infringed upon their first amendment rights. *Id.* at 129. The plaintiffs prevailed in the lower courts. *Id.* By the time the case reached the Supreme Court, the named plaintiffs had graduated. Noting that a case and controversy between the plaintiffs and school officials no longer existed, the Court ruled that the case was moot because of the district court's failure to "identify" the class when it was certified. *Id.* at 130. The Supreme Court vacated the lower courts' judgments. *Id.*

the interests of the class would receive practical protection by the representative team in the litigation. But in neither kind of case did the Court explore how the adequacy of the representative should be determined. To the extent that the Rule 23 cases focused on the character of the named representative's claim as a factor critical to the determination of representational adequacy, they were out of step with the realities of modern class litigation. In such cases, the real protector of the class's interest is the representative's attorney.[277] The only practical relevance of the named representative's individual claim is its effect on the representative team's performance.

In most complex class litigation it is clear that the plaintiff cannot be called on to make tactical or legal decisions about class relief, no matter how closely the plaintiff's interests are aligned with those of absent class members.[278] Our judicial system does not even recognize this function as an appropriate goal. For example, even if the plaintiff's individual claim in *Franks* had not become moot, it would not have been appropriate to leave the final decision to him as to whether retroactive seniority should be sought as class relief.[279]

Once the representative client has authorized the initiation of a class action, the creation of a co-client to whom the attorney has an independent duty of fidelty in effect has been authorized. The representative has also given up the ability to control the course of the litigation, a function that would have been retained by the plaintiff as a sole litigant. Courts have recognized this basic truth in a variety of contexts.[280] In *Geraghty,* the Court did not explicitly hold that the attorney's vigorous prosecution of the merits of the class's claim could satisfy Rule 23 as well as the case and controversy requirement. Had the Court done so, the stage would have been set to consider the circumstances under which an attorney's incentive, ability, and

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277. *See* Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1190 (S.D.N.Y. 1982) (where "no apparent conflict exists, and their counsel have diligently and competently urged the interests of the class, the requirement that the named plaintiffs adequately represent the class is satisfied despite their lack of sophistication in legal or financial matters"); Hi-Co Enter., Inc. v. Conagra, Inc., 75 F.R.D. 628, 631 (S.D. Ga. 1976) (adequacy of representation depends more on quality of class counsel than on any other factor); Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1974) ("it can hardly be said that she, through her attorney, has been anything but a vigorous and tenacious plaintiff"); Note, *Class Representative, supra* note 267, at 1655 ("The class is the real plaintiff and the lawyer its real representative."); *supra* note 162 and accompanying text. *But see* Helfand v. Cenco, Inc., 80 F.R.D. 1, 7-8 (N.D. Ill. 1977) ("class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives").

278. *See* cases cited *supra* note 248.

279. This is not to say that the named plaintiff cannot play an active and useful role in the case. For a discussion of the role of the plaintiffs' committee, see Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1178 (5th Cir. 1982). In most complex class litigation, however, the named plaintiffs are simply unable to play an active role. *See* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973).

280. *See supra* notes 241-51 and accompanying text.

resources provide a satisfactory substitute under Rule 23(a) for a representative with a personal stake in every aspect of the class's claims. Unfortunately, when the Court finally began to focus on Rule 23, it seemed to lose sight of the purpose of the adequate representative requirements, and began to construe the rule in a manner at odds with both the Court's article III decisions and the history of the rule.

C. East Texas Motor Freight *and* Falcon: *Wrong Turns for Rule 23*

The Court began its series of "wrong turns" in Rule 23 cases with its decision in *East Texas Motor Freight System, Inc. v. Rodriquez.*[281] An employment discrimination case was filed by three Mexican-Americans employed as city truck drivers. Each plaintiff had requested and was denied a transfer to an over-the-road or "line" driver position. The plaintiffs alleged that the employer's no-transfer policy and collective bargaining agreements with the Teamsters Union effectively locked them and other minority city drivers into lower paying positions,[282] thus perpetuating the effects of discrimination in initial job assignment.[283]

The plaintiffs proposed to represent a class composed of all Mexican-American and black city drivers, as well as all minority applicants for line driver positions. The plaintiffs failed, however, to move for class certification and confined their evidence at trial to their individual claims. The district court denied the claims of the plaintiffs and dismissed the class allegations because of their failure to move for certification or prove the class claims. The Fifth Circuit reversed, holding that the district court should have considered the certification issue sua sponte.[284]

After certifying the class, the Fifth Circuit found class-wide liability on the basis of the proof adduced at the trial of the individual claims.[285] The Supreme Court unanimously reversed. According to Justice Stewart, it was error to certify the class simply because by the time the case reached the Fifth Circuit the named plaintiffs were not proper class representatives under Rule 23(a).[286] Had the Court based its conclusion on the failure of the named

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281. 431 U.S. 395 (1977).

282. *Id.* at 397-98. The company required city drivers to resign from their jobs before applying for the more lucrative line driver position. Collective bargaining agreements with the Teamsters Union complemented the no transfer policy by requiring a city driver who was reassigned as a line driver to forfeit all seniority accumulated in the city driver position. *Id; see also* Teamsters v. United States, 431 U.S. 324, 343-44 (1977) (line drivers and city drivers represented distinct classes).

283. Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974).

284. *Id.*

285. *Id.* at 61. At the time of the Fifth Circuit's decision, the circuits were in agreement that a seniority system, although neutrally applied, constituted a violation of Title VII if it prepetuated the effects of past discrimination in hiring or job assignment. Because proof adduced in support of the plaintiffs' individual cases demonstrated class-wide discrimination in job assignment and hiring, *id.* at 66, the court of appeals was merely following the existing authority in finding a class-wide violation.

286. 431 U.S. at 404-05. The Court did refer to the plaintiffs' failure to prosecute the class

plaintiffs and their attorneys to prosecute the class's claim, the opinion would have been unremarkable; indeed, it would have had the beneficial effect of highlighting the responsibilities of class representatives.[287] But the Court's reason for finding that the plaintiffs were not proper class representatives was that the plaintiffs were not *members* of the class. In support of the Court's holding, Justice Stewart cited, without explanation, two lines of authority. The first line of authority consisted of the article III cases and included *Sosna*. The second line of authority, which included *Bailey*, established that class plaintiffs must plead class membership and injury similar to those of class members.[288]

The plaintiffs in *East Texas*, however, had satisfied the case or controversy requirement of article III under *Sosna* and had properly pled class membership as specified in *Bailey*. The problem in *East Texas*, according to Justice Stewart, was that at the time that the Fifth Circuit certified the class, the plaintiffs had not demonstrated that they had been injured by the class-wide discrimination.[289] Neither line of authority supported the proposition that the plaintiffs' eligibility to represent a class hinged on the continued viability of their own claim. Indeed, such a suggestion flew in the face of *Sosna*, *Gerstein*, and *Franks*, each of which had been fully litigated without a plaintiff who had a viable individual claim. Apparently disturbed by the inherent inconsistency between its holding and the article III cases, the Court noted that the lack of merit in a plaintiff's individual claim would not necessarily be fatal to a class action if life had been breathed into the class by an appropriate certification order before it was determined that the named plaintiffs were not members of the class.[290]

The Supreme Court's effort to distinguish cases in which litigation had gone forward on behalf of "headless" classes, however, could do no more than pull the *East Texas* decision into rough alignment with *Sosna, Gerstein,*

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claim and an asserted conflict between the interests of the plaintiffs and the class. Those considerations, however, were plainly secondary to the "evident lack of class membership" upon which the Court based its decision. *Id.*

287. The Fifth Circuit's decision on the merits (and thus relief to the class) was doomed in any event. On the same day that it decided *East Texas*, the Court ruled in Teamsters v. United States, 431 U.S. 324, 348-55 (1977), that bona fide seniority systems (those adopted and maintained without a specific discriminatory purpose) were protected under Title VII even if they perpetuated the effects of prior discrimination. *Id.* The seniority system at issue in *Teamsters* was identical to that attacked in *East Texas.*

288. 431 U.S. at 403.

289. *Id.*

290. The *East Texas* Court stated:

> Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claim would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims.

Id. at 406 n.12.

and *Franks*. The Court's apparent willingness to test the plaintiff's representative status on the basis of the validity of their own claim remained fundamentally at odds with virtually all Rule 23 decisions on this question. Courts had consistently held that the validity of an individual's claim was not a factor to be weighed in determining that individual's eligibility for class membership or adequacy as a class representative.[291] The *East Texas* decision thus caused confusion in some lower courts, particularly in cases where the plaintiffs had moved for but had been denied class certification, and subsequently lost on their individual claims.[292]

The decision in *East Texas* was also exceedingly difficult to reconcile with the Court's subsequent decision in *Geraghty*.[293] If the plaintiffs in *East Texas* were not members of the same class suffering the same injury, how could Geraghty have filled that role when his case reached the court of appeals? An obvious explanation for the inconsistent results was that Geraghty and his attorney had demonstrated an ability and willingness to represent the class as "private attorney generals," a role that the plaintiffs in *East Texas* had not filled. That distinction, however, had nothing to do with the status

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291. *See supra* text accompanying notes 225-35.

292. The confusion is typified by the series of Fifth Circuit decisions in Satterwhite v. City of Greenville, 395 F. Supp. 698, 700 (N.D. Tex. 1975), *aff'd in part*, 549 F.2d 347 (5th Cir. 1977), an across-the-board class action by an unsuccessful job applicant who alleged that she was denied employment because of her sex. Class certification was denied by the district court and, after a trial on the merits, judgment was entered for the defendant on the plaintiff's claim. 395 F. Supp. at 701. A Fifth Circuit panel affirmed on the merits of the individual claim, but reversed the denial of class certification. 549 F.2d at 348.

On rehearing, a divided panel vacated its decision on the class issue and remanded for an evidentiary hearing on the issue of whether the plaintiff could be an adequate representative. *Satterwhite*, 557 F.2d 414 (5th Cir. 1977), *rev'd on rehearing*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated and remanded*, 445 U.S. 940 (1980). Rehearing was then granted by the full court, which vacated the panel opinion and, relying on *East Texas*, affirmed the district courts' denial of class certification. *Satterwhite*, 578 F.2d at 999. According to the court, it was "now apparent" that plaintiff "is not a member of the class of discriminatees she seeks to represent." *Id.* at 992. Unlike the plaintiffs in *Sosna* and *Franks*, whose claims were mooted before the appellate process was exhausted, Satterwhite had "never suffered any legally cognizable injury either in common with the class or otherwise." *Id.* The Supreme Court granted certiorari and vacated for reconsideration in light of *Geraghty*. 445 U.S. at 940.

On remand, the Fifth Circuit decided it was unable to determine whether Satterwhite could still be an adequate class representative and sent the matter back to the district court. *Satterwhite*, 634 F.2d 231 (5th Cir. 1981) (en banc); *see also* Armour v. City of Anniston, 597 F.2d 46 (5th Cir. 1979) (settlement of plaintiff's claim will not relieve liability for past discrimination against class), *vacated*, 445 U.S. 940 (1980); Comment, *Certification of Class Actions on Appeal: Considerations of Mootness and the Typicality of Plaintiffs' Claims*, 56 TUL. L. REV. 1331, 1350-1361 (1982) (in order to have standing, a named plaintiff cannot merely serve as a volunteer to litigate the claims of a class of other individuals; the plaintiff must assert an individual claim against the defendant).

293. Justice Powell dissented in both *Geraghty*, 445 U.S. at 409-24 (Powell, J., dissenting) and in Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 344-59 (Powell, J., dissenting). In his *Roper* dissent, he commented:

> On remand, respondents will serve as "quasi-class representatives" solely for the purpose of obtaining class certification. Since they can gain nothing more from

of the named plaintiffs' claim which the Court in *East Texas* had indicated was an important factor in determining the plaintiffs' eligibility to represent the class. A number of lower courts confined *East Texas* to its peculiar facts (the combination of a loss on the merits with the failure to move for class certification and to put on class-wide proof) and held that across-the-board class actions survived.[294] That interpretation of the case proved quite wrong.

In *General Telephone Co. v. Falcon,*[295] a Mexican-American alleged that his employer had denied him a promotion in violation of Title VII, and that the company discriminated generally against Hispanics in hiring, job assignment, and promotion. The district court certified a class of Mexican-American employees and applicants for employment at the facility where Falcon worked.[296] After trial, the court concluded that Falcon's individual

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> the action, their participation can be intended only to benefit counsel and the members of a putative class who have indicated no interest in the claims asserted in this case. Respondents serve on their own motion—if indeed they serve at all. Since no court has certified the class, there has been no considered determination that respondents will fairly and adequately represent its members. Nothing in Rule 23 authorizes this novel procedure, and the requirements of the Rule are not easily adapted to it. Are respondents members of the class they seek to represent? See *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 403-404, (1977). Are their currently nonexistent claims "typical of the claims . . . of the class" within the meaning of Rule 23(a)(3)?

445 U.S. at 357.

294. *See, e.g.,* Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.) (individual's claim challenging defendant's college degree requirement sustained though plaintiff could never be a serious college candidate), *cert. denied,* 439 U.S. 835 (1978); Bartelson v. Dean Witter & Co., 86 F.R.D. 657 (E.D. Pa. 1980) (there is no absolute bar to representation of class by persons who were never hired by defendant); Quigley v. Braniff Airways, Inc., 85 F.R.D. 74 78-79 (N.D. Tex. 1979) (plaintiff complaining of one employment practice may represent employee complaining of different employment practice in an across-the-board situation, consistent with legislative intent underlying Title VII); Beasley v. Griffin, 81 F.R.D. 114, 116-17 (D. Mass. 1979) (though certification of a claimless class is prohibited, a majority of courts agree that across-the-board certification in Title VII suits is proper); Wajda v. Penn Mutual Life Ins. Co., 80 F.R.D. 303, 307-09 (E.D. Pa. 1978) (allegations of broad-based discrimination permits plaintiffs affected by discriminatory practices to complain on behalf of entire class against whom discrimination is directed); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 77 n.6 (D.D.C. 1978) (*East Texas* only precludes maintenance of class action by parties not discriminated against at all). The Fourth Circuit reached a contrary result in Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.), *cert. denied,* 444 U.S. 929 (1979). The Third Circuit in Alexander v. Gino's, Inc., 621 F.2d 71, 75 (3d Cir. 1980), interpreted *East Texas* to require that some classes satisfy the strict requirements of Rule 23(a), but that across-the-board concepts then permitted the court to consider claims technically beyond the scope of the class claim. *See generally* Comment, *The Proper Scope of Representation in Title VII Class Action: A Comment on East Texas Motor Freight Systems, Inc., v. Rodriguez,* 13 HARV. C.R.-C.L. L. REV. 175, 186 (1978) (in *East Texas,* Justice Stewart concluded that class actions may be commenced only by those possessing identical interests and suffering the same injury as the class members); Note, *Anti-discrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2),* 88 YALE L.J. 868, 882-83 (1979) (just because plaintiff alleges discrimination does not ensure that he or she will adequately represent the real victims).

295. 457 U.S. 147 (1982).

296. *Falcon,* 626 F.2d 369, 376 (5th Cir. 1980) (discussing district court's actions in an unpublished opinion, No. CA 3-75-0403-B (N.D. Tex. Mar. 22, 1977)).

promotion claim, as well as the class claim on hiring discrimination, had been proved. The court, however, found no class-wide discrimination in promotions. An injunction was issued requiring modifications of General Telephone's hiring procedures to increase minority employment.[297] Notice was then given to the applicant class and back pay awards were made to Falcon and thirteen class members who appeared and filed claims.[298] The defendant appealed.

The Fifth Circuit, relying on its across-the-board line of decisions, affirmed the class certification, but remanded the case for further findings on the merits of the individual and class hiring claims.[299] The Supreme Court granted certiorari solely "to decide whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment" and held that the class should not have been certified.[300]

The *Falcon* decision rested on two somewhat related bases: the failure of the case to promote judicial efficiency and failure of the plaintiff to satisfy the terms of Rule 23(a). According to Justice Stevens, class actions conserved the resources of courts and parties by allowing the litigation of many related claims "in an economical fashion under Rule 23."[301] The maintenance of a single action in *Falcon,* however, did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure"[302]

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297. Liability was found and injunctive relief granted in part I of a two-phase litigation. After granting the injunction, the district court ordered General Telephone to take 10 specific actions designed to accelerate an affirmative action plan which was already in place. These included recruitment of minorities, advertising, and the providing of college tuition aid to minority employees desiring training for better positions. *Falcon*, No. CA 3-75-0403-B (N.D. Tex. Mar. 22, 1977) (Findings and Conclusions).

298. *Falcon,* 463 F. Supp. 315 (N.D. Tex. 1978), *aff'd in part and remanded,* 626 F.2d 369 (5th Cir.), *vacated and remanded,* 450 U.S. 1036 (1980).

299. 626 F.2d at 375, 382. On the initial appeal, the Fifth Circuit affirmed the trial court's finding that Falcon had been discriminatorily denied a promotion, but concluded that the factual findings on the class hiring claim were inadequate and remanded for more specific treatment. *Id.* at 380-82. The Supreme Court granted certiorari and vacated for reconsideration in light of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). General Tel. Co. v. Falcon, 450 U.S. 1036 (1981). The court of appeals thereafter vacated that portion of its earlier opinion in which the court had affirmed the lower courts' holding on Falcon's individual claim and reaffirmed all other parts of its original opinion, including those portions approving class certification. 647 F.2d 633, 633 (5th Cir. 1981), *vacated in part and remanded,* 457 U.S. 147, 161 (1982). Falcon's individual claim was remanded to the trial court for reconsideration in light of *Burdine.*

300. 457 U.S. at 155.

301. *Id.*

302. *Id.* In Justice Stevens's zeal to demonstrate how different the plaintiff's individual claim was from that of the class, he inaccurately described the class claim as one based on a disparate impact theory which he contrasted with Falcon's individual case of disparate treatment or intentional discrimination. *Id.* at 154, 159. In fact, *both* the individual's and class's claims were disparate treatment cases. In Teamsters v. United States, 431 U.S. 324 (1977), the Court observed:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral

because Falcon's individual promotion claim and the class hiring claim proceeded on different theories[303] and were proved by different kinds of evidence.

A second, and more important shortcoming of Falcon's suit was its failure to satisfy the requirements of Rule 23(a). Explicitly putting an end to across-the-board class certification, the Court held that Falcon's claim of discrimination in promotion was neither typical of the class hiring claim, nor did its adjudication "require the decision of any common question concerning the failure of petitioners to hire more Mexican-Americans."[304] Neither commonality nor typicality could be supplied by the "mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin. . . ."[305] Relying solely on *East Texas,* the *Falcon* Court found that the district court had erred in certifying the class because the limited nature of Falcon's claim rendered him ineligible to represent a class composed in part of unsuccessful applicants.[306] While claiming that the propriety of a class certification should not be determined by hindsight, Justice Stevens identified the error of the district court and the error inherent in the across-the-board approach as a failure to demand that the plaintiff's individual claim encompass the claims of the class.[307]

A degree of hindsight by the Court was called for here. Like *East Texas, Falcon* reached the appellate courts with a record which permitted an evaluation of the performance of the representative team on behalf of the class.[308] Unlike the team in *East Texas,* Falcon and his attorneys had not only obtained class certification, but also had secured relief for class members by convincing the district court that class-wide discrimination had occurred. The thirteen class members who were found entitled to share over $39,000 in back pay as the result of these team efforts must have been surprised to learn that they had been inadequately represented. That surprise could only have increased with the realization that in order to protect their interests,

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> in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. at 335-36 n.15.

303. 457 U.S. at 159 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1973)). Class-wide disparate treatment or intentional discrimination can be established through statistical proof of market disposition between the appropriate comparison populations and the actual work force. Hazelwood School Dist. v. United States, 433 U.S. 299, 306-13 (1977); Teamsters v. United States, 431 U.S. 324, 337-40 (1977). *Falcon* did not attack a facially neutral employment practice. *Cf.* Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801 (5th Cir. 1982). He attempted to prove intentional discrimination against the class by use of statistics. Neither the district court, the court of appeals, nor the parties to the litigation ever treated the class claim as one litigated on a disparate impact theory.

304. 457 U.S. at 158.

305. *Id.* at 158 n.15.

306. Although the opinion is not explicit on the point, Justice Stevens's reliance on *East Texas* suggests that he considered Falcon not to be a member of the class of applicants.

307. 457 U.S. at 160.

308. *See id.* at 152-53.

the Court had not only deprived them of their back pay awards, but also negated the finding of class-wide discrimination made on their behalf.[309]

The result in *Falcon* cannot be supported by the language, history, or policy underlying Rule 23. In the first place, Justice Stevens's historical explanation for group litigation is simply wrong. As Professor Yeazell has demonstrated, the class action has never functioned to group together individual cases that would otherwise clog the courts if brought separately.[310] Instead, the class action has been a means of facilitating the litigation of group claims which otherwise would not have been brought at all.[311] That was, of course, the situation with the applicant class in *Falcon,* because there was no indication that any unsuccessful Mexican-American applicant was eligible to file a Title VII suit or was otherwise in a position to bring the class claim before the court.[312]

The Court's interpretation of the text of Rule 23(a) has no better support than its historical analysis. The drafters of the federal rules did not specify how the commonality and typicality requirements were to be applied, and the pre-1966 decisions did not suggest that there had to be an identity, either factually or legally, between the representative's claims and those of the class.[313] Viewing the matter solely as a question of statutory construction,

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309. The *Falcon* Court remanded for further proceedings consistent with its opinion. 457 U.S. at 161. But given the reasoning of the opinion, it is not clear what the purpose of the remand was. Since Falcon was ineligible to represent the class of applicants and the finding against the class of employees on the promotion claim had become final, there did not seem to be any options left for the lower courts. There was certainly nothing in the opinion suggesting that the district court should reevaluate Falcon's standing as a class representative. Bothered by this question, Chief Justice Burger dissented from that portion of the opinion which remanded the case. *Id.* at 161 (Burger, C.J., dissenting). Because it was "entirely clear on this record that no class should have been certified," the Chief Justice felt the proper procedure was to "simply reverse the Court of Appeals and remand with instructions to dismiss the class claim." *Id; see also* Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions,* 69 VA. L. REV. 11, 48 n.142 (1983) (doubting that certification of class on remand would be consistent with the Court's opinion) [hereinafter cited as Rutherglen, *Notice, Scope & Preclusion*]. The Court's decision did not, however, preclude intervention by representatives of the applicant class on remand. *See* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

310. *See* Yeazell, *History of Class Action, supra* note 11, at 858.

311. *See, e.g.,* Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 563 (2d Cir. 1968) ("a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group" (quoting Escott v. Barchris Const. Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied,* 382 U.S. 816 (1966)); Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968) ("Since the difficulty of proving a violation under the securities laws often is great and the injury to individual investors may not be sufficiently large to justify on an individual basis the investigative and litigation expense involved, a class action may be the only meaningful method by which private rights may be effectively enforced."); *see also* Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 686 (1941) (class action appropriate where those injured "are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive"); *Advisory Committee Note, supra* note 117, at 103 (amounts at stake may be so small that separate suits would be impracticable).

312. *See infra* note 340.

313. *See supra* notes 147-53 and accompanying text.

the post-1966 across-the-board decisions stood on as firm a ground as the Court's construction of the rule. Given the consensus in favor of a broad construction of Rule 23(a) requirements, it is not surprising that Justice Stevens was unable to support his construction with any legislative history or with a single decision other than *East Texas.*

The *Falcon* rationale is also fundamentally inconsistent with the Supreme Court's view of class actions and representative adequacy as expressed in the article III cases. *Geraghty* suggests that a named plaintiff whose personal claim is moot may nevertheless seek class certification for a definable group of people. *Geraghty* is thus at odds with the holding of *Falcon:* that a named plaintiff whose personal claim is related to, but different from, the class claim is ineligible to seek class certification. How can a personal claim have fewer common elements and be less typical of a class claim than one that is moot? The *Sosna-Geraghty* line stands for two propositions which are impossible to square with *Falcon.* First, a certified class with a live class claim can satisfy the case or controversy requirement of article III. Second, the adequacy of representation requirement of Rule 23 can be satisfied without a plaintiff with a live claim.

In *Sosna, Gerstein,* and *Franks,* the Court found the class to have been adequately represented because: (1) there were no perceived conflicts between the named representative and the class with respect to relief sought for the class; (2) there could be no question about the "continued desire" of the class members for the relief sought; and (3) attorneys for the plaintiff had vigorously prosecuted the class claim.[314] These factors received entirely different treatment in the *Falcon* decision.

In *Falcon,* there was no conflict between the plaintiff and the class of applicants with respect to the relief requested.[315] The efforts of Falcon and his attorneys on behalf of the class had achieved success in the trial court and could not be considered deficient on the record.[316] Thus, the very same

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314. *See supra* text accompanying notes 257, 260, 265-67.

315. General Telephone argued that there was a conflict of interest between Falcon and the applicant class because an enlargement of the pool of Mexican-American employees would decrease Falcon's chances for promotion. 457 U.S. at 157 n.13. In light of the Court's holding that Falcon was ineligible to be a representative of the applicant class as a matter of law, it was unnecessary for it to reach this issue. *Id.* The conflict, if any existed, was theoretical only, for Falcon sought and obtained relief which was in fact calculated to increase minority hiring at General Telephone. *Cf.* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1178 (5th Cir. 1978) (noting that "potential conflict" between named plaintiffs who received back pay award and majority of class who did not receive such an award disappeared when plaintiffs rejected back pay awards and appealed denial of class relief).

316. This is not an argument that the applicant class was necessarily well represented. Indeed, there were indications that a more careful job could have been done for the class. The pleadings contained no allegation of hiring discrimination and interrogatories addressed to the hiring issue were not answered. *Falcon,* 457 U.S. at 150-51 nn.1-4. Furthermore, the statistical evidence on hiring discrimination was marginal and unsupported by expert analysis. *Falcon,* 626 F.2d at 373 n.4, 381 n.16. The point is that any actual deficiencies in representation were irrelevant to the Supreme Court. Had the Court inquired into the quality of the performance by the representative team, the fact that they were successful on behalf of the class would

factors which the Court considered important to the adequacy calculation in *Sosna, Gerstein,* and *Franks* were simply ignored in *Falcon* on the ground that the Rule 23 decision should not be judged by hindsight. Nevertheless, hindsight consideration of certification decisions was exactly what occurred in all the article III cases.

Falcon's most serious failing, however, is its establishment of a narrow, formalistic approach to the determination of a putative class representative's eligibility to proceed in litigation on behalf of a group. Justice Stevens correctly noted that the commonality and typicality requirements are guideposts for predicting whether the interests of absent class members will be adequately protected.[317] But guideposts by their nature cannot be one and the same as the goal. In *Falcon*, the goal itself was ignored because the preliminary guideposts were judged to be inadequate. Thus the Court, without apparent recognition of the paradox, stripped the *Falcon* applicant class of its relief and justified the result as necessary to protect the interests of absent class members.

D. The Aftermath of Falcon

Falcon's restriction on the class action could have been worse. The employer had argued for a per se rule that employees could never represent nonemployees, and for a typicality requirement that the class claim must be partially established by the plaintiff's success in his or her individual suit.[318] The *Falcon* Court refused to go that far and instead suggested that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."[319]

In the lower courts, the *Falcon* decision has not resulted in the demise of the broadly based class action. Admittedly, a number of courts have applied *Falcon* in Title VII cases to deny certification of diverse classes including those composed of applicants and employees,[320] employees in dif-

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have loomed large. *Cf.* Hill v. Western Elec. Co., 672 F.2d 381, 391 n.8 (4th Cir. 1982) ("the representation actually provided had all the indicia of diligence and practical effectiveness, including most notably that it yielded a favorable result on these class members' claims.").

317. *Falcon,* 457 U.S. at 157 n.13.

318. Brief for Petitioner at 19, *Falcon,* 457 U.S. 147 (1982). The petitioner was generally supported in this position by the United States. *See* Brief for United States as Amicus Curiae at 16, *Falcon,* 457 U.S. 1036 (1981).

319. 457 U.S. at 159 n.15. It has been suggested that footnote 15 is the most significant part of the *Falcon* decision. *See* Millenson, *Title VII Class Actions After Falcon,* 8 EMPL. REL. L.J. 526, 531 (1983).

320. *See, e.g.,* Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 204-05 (E.D. Pa. 1982) (class certification denied because commonality and typicality of claims was lacking between claims of rejected applicants and employees); Hawkins v. Fulton County, 95 F.R.D. 88 (N.D. Ga. 1982) (plaintiffs were denied across-the-board certification in Title VII because of a lack of commonality of their discrimination claims).

ferent job classifications,[321] and employees in different facilities.[322] In other cases, courts sometimes have denied class certification solely because the named plaintiff's claim was atypical.[323] One court has even construed *Falcon* as effectively overruling *Sosna, Franks,* and *Geraghty,* and has held that a named plaintiff who has lost his own suit is automatically ineligible to represent a class.[324] Other courts have certified, or refused to decertify, classes encompassing persons whose relationships to the defendant differed distinctly from that of the named plaintiff. Current employees have been approved as representatives of classes composed in part of unsuccessful applicants;[325] applicants have obtained certification of classes including current employees;[326] and employees in different job categories from those of many class members have been allowed to proceed as class representatives.[327] In most of these decisions, the plaintiffs have alleged a general policy of discrimination based on the use of subjective personnel policies affecting all class members. For example, in *Carpenter v. Stephen F. Austin State University,*[328] three former custodial workers were held to be proper representatives of a class composed of past, present, and prospective black and female employees in all job classifications other than teacher.[329] The suit constituted an across-the-board

321. *See, e.g.,* Wilkins v. University of Houston, 695 F.2d 134 (5th Cir. 1983) (judgment vacated and remanded due to supervening *Falcon* decision); Bell v. J. Ray McDermott & Co., 30 Empl. Prac. Dec. (CCH) ¶ 33,310 (E.D. La. 1982) (plaintiffs, who were blue collar employees, could not represent office administrative and professional employees); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82 (N.D. Ga. 1982) (where claims of named plaintiffs in employment discrimination action were not representative of any claims of numerous groups who were within the class plaintiffs sought to represent, the motion to certify the class has to be denied in part).

322. *See, e.g.,* Ladele v. Consolidated Rail Corp., 95 F.R.D. 198 (E.D. Pa. 1982) (party seeking to utilize class action mechanism must demonstrate that requirements of Rule 23 are met).

323. *See, e.g.,* McNichols v. Lee Rhoades & Co., Inc., 97 F.R.D. 331 (N.D. Ill. 1982) (plaintiff atypical of class because his claims were subject to unique defenses inappliable to remainder of class); Jackson v. City of Belle Glade, 95 F.R.D. 384 (S.D. Fla. 1982) (court could not assume an individual's claims would be typical of all black residents of Belle Glade).

324. *See* Walker v. Jim Dandy Co., 97 F.R.D. 505, 509 (N.D. Ala. 1983) (plaintiffs "cannot represent a class including female applicants for employment and employees of Jim Dandy, because their individual claims have totally disappeared").

325. *See, e.g.,* Meyer v. McMillan Publishing Co., 95 F.R.D. 411 (S.D.N.Y. 1982) (employees complaining of discrimination in promotions could represent unsuccessful applicants complaining of discriminatory hiring practices because allegations made in affidavits concerned discrimination in promotions as well as other aspects of employment).

326. *See, e.g.,* Shannon v. Hess Oil V. I. Corp., 96 F.R.D. 236 (D.V.I. 1982) (rejected applicants not disqualified from properly representing current employees of employer); Kraszewski v. State Farm Gen. Ins. Co., 30 Empl. Prac. Dec. (CCH) ¶ 33,302 (N.D. Cal. 1982) (certification of class consisting of successful and unsuccessful applicants upheld).

327. *See, e.g.,* Evans v. United States Pipe & Foundry Co., 696 F.2d 925 (11th Cir. 1983) (disabled ex-employee not disqualified from requesting certification of class of employees); Nagy v. Jostens, Inc., 31 Empl. Prac. Dec. (CCH) ¶ 33,341 (D. Minn. 1982) (no grounds to decertify class conditionally certified three years earlier due to subsequent legal developments criticizing general certifications of across-the-board allegations); Osmer v. Aerospace Corp., 31 Empl. Prac. Dec. (CCH) ¶ 33,357 (C.D. Cal. 1982) (a technician could appropriately represent class despite fact that most technicians were better educated than she).

328. 706 F.2d 608 (5th Cir. 1983).

329. Like *Falcon, Carpenter* reached the appellate court after a trial on the merits of the

attack on the university's racially and sexually discriminatory employment practices. The court upheld class treatment because the plaintiffs challenged "the subjective job placement, qualification [for promotions] and compensation practices" which allegedly affected all minority employees regardless of where they worked.[330] Similarly, in *Richardson v. Byrd*[331] the court affirmed the certification of a class composed of all past and present female employees of a county sheriff's office, as well as all female applicants for such employment. One of the practices under attack involved the assignment of all new female deputies to the jail, a policy that limited the number of female deputies who could be hired and restricted their transfer to more desirable sections. By the time of class certification, the plaintiff had obtained a transfer from the jail, and was complaining about another refusal to transfer. Relying on *Falcon,* the defendant argued that an employee in these circumstances could not maintain a class action on behalf of applicants who were never hired. The court responded by holding that the plaintiff's claims involved issues of law and fact common to those of applicants and employees assigned to the jail.[332]

Without regard to outcome, however, all the post-*Falcon* decisions have focused almost exclusively on the differences between the named plaintiffs and absent class members. These differences determine whether a suit may be maintained as a class action; other indicia of adequacy are ignored. Courts grant certification when they perceive a general policy of discrimination that renders differences between a named plaintiff and absent class members unimportant. Courts deny certification when they reject proof of such a general policy, and conclude that the named plaintiff has not suffered the same injury as the class. The Fifth Circuit's decision in *Wheeler v. City of Columbus*[333] illustrates this post-*Falcon* pattern.

In *Wheeler,* an unsuccessful female applicant for city employment filed an across-the-board attack on a variety of practices and policies that allegedly discriminated against women. The district court certified a class of past and present female employees, as well as unsuccessful female applicants. At trial, the plaintiff presented a "plethora of statistical evidence" to support both the hiring claim and the claims made on behalf of the employees and ex-employees.[334] She demonstrated a "striking disparity" between the percentage of female applicants and the percentage of females hired and also established that women employees were concentrated in a few low-paying

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class and individual claims. The court of appeals, however, did not rely solely on a hindsight view of class certification, but found that "the district court did not abuse its discretion by initially certifying the class. . . ." *Id.* at 616.

330. *Id.* at 617.

331. 709 F.2d 1016 (5th Cir. 1983).

332. *Id.* at 1020.

333. 686 F.2d 1144 (5th Cir. 1982), *decision after remand,* 703 F.2d 853 (5th Cir. 1983) (per curiam).

334. 686 F.2d at 1151.

clerical positions.[335] Her general statistical showing was supported by voluminous anecdotal testimony concerning specific instances of discrimination, and more narrowly drawn statistical exhibits comparing the salaries of men and women employed in the same job categories. The district court, however, accepted the city's explanations for the disparities and found for the defendant on both individual and class claims. On appeal,[336] the court, relying on *Falcon,* vacated the original class certification in a brief per curiam opinion.[337] It may well be that the class of female employees and applicants deserved to lose on the merits, but in light of the plaintiffs' extensive effort on their behalf, it is difficult to argue that they did not have their day in court.[338]

Thus *Falcon,* in the name of protecting the interest of absentee class members, has turned the courts' attention away from the most important factor to be considered in making the adequacy determination—the ability and willingness of the representative team to litigate the class claim. *Falcon* also suggests that a class certification decision may be made without regard to its actual effect on the absent class members and the other parties to the litigation.[339] The applicant class in *Falcon,* for example, lost not only the relief awarded by the trial court, but also, as a practical matter, any opportunity to regain the victory with a proper class representative. Unless an applicant class member was eligible to intervene as a class representative on remand,[340] the class hiring claim would have necessarily prescribed for

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335. *Id.*

336. On the first appeal, the Fifth Circuit concluded that the district court had applied the wrong legal standards to both the class and individual claims. *Id.* It reversed and remanded for reconsideration. *Id.* at 1151-52, 1154. On remand, the district court reaffirmed its earlier ruling but did not decertify the class in light of *Falcon.* Plaintiffs subsequently filed a second appeal.

337. Wheeler v. City of Columbus, 703 F.2d 853, 855 (5th Cir. 1983) (per curiam).

338. *Wheeler* demonstrates that *Falcon* can cut unfairly in both directions. The city in *Wheeler* defended all of the class claims on the merits and won. But the only person who cannot now institute an identical class action against the city is Wheeler herself, and she is ineligible only because she would be barred from relitigation of her individual claim. The city has obtained none of the res judicata benefits of its victory on the class claims. *See* Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 79-81. That might be a fair result, but only if the class interest was in fact inadequately represented. *Cf.* Grigsby v. North Miss. Medical Center, Inc., 586 F.2d 457, 461-62 (5th Cir. 1978) (litigants not diligent in performing obligations to properly represent class claims); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 541 (W.D. La. 1976), *aff'd,* 577 F.2d 1132 (5th Cir. 1978) (class certification revoked due to counsel's insufficient representation of class); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 710 (W.D. La. 1976) (class representatives failed to achieve due process standard which required stringent representation of absent parties).

339. *See* Chayes, *supra* note 261, at 45.

340. A class action under Title VII can only be initiated by one who has filed timely administrative charges against the employer required by § 706(a) of the Act. 42 U.S.C. § 2000e-5(b) (1982). It is not necessary that other employees have filed such charges in order to be class members. *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). The class claims, however, must be sufficiently "like or related to" the allegations in the named plaintiffs' Equal Employment Opportunity Commission (EEOC) charge so that an EEOC investigation could

the years at issue in *Falcon*.[341] In contrast, in *Wheeler* the city was deprived of the res judicata benefits of the ruling in its favor, despite the fact that the class issues apparently were competently litigated by Wheeler and her lawyers.[342]

Part of the responsibility for *Falcon* undoubtedly rests with the circuit courts that accepted the across-the-board approach to certification without coming to grips with the real dangers of class preclusion at the hands of incompetent representatives. As classes became broader and more diverse, these courts should have developed standards for testing adequacy in a manner commensurate with the greater risks to the classes involved. Nothing of the sort happened. The Supreme Court, in its overriding desire to limit the scope of class actions in civil rights cases, has not supplied a systematic answer to the ultimate question in every class action: Will the class as an entity be protected in fact? *Falcon,* in focusing judicial attention on factors which can be no more than preliminary indicators of representative adequacy, has confused the issue and hampered the inquiry. But the question of representative adequacy must be addressed in every case filed as a class action, and its resolution must still be attempted by the lower courts.

"reasonably be expected to grow out of the charge of discrimination." Gamble v. Birmingham S. R.R. Co., 514 F.2d 678, 688 (5th Cir. 1975); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

In *Falcon,* the named plaintiffs' EEOC charge alleged only discrimination in promotion. *See* Falcon v. General Tel., 626 F.2d 369, 372 n.2 (5th Cir. 1980). It is unsettled whether post-judgment intervention by an applicant class member, who had not filed an EEOC charge, could have saved the applicants' case.

341. Title VII requires aggrieved persons to file a charge of discrimination with the EEOC within 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e) (1982). The timely filing of an EEOC charge is a prerequisite to suit under the Act. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). The district court in *Falcon* treated the hiring claim as spanning the period of July 1972 through July 1976. The filing of the complaint in 1975 tolled the running of the EEOC statute of limitations (90 days after issuance of a right to sue notice from the EEOC), but did not toll the running of the statute for the filing of EEOC hiring discrimination charges. *See* Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392, 2397 (1983). By the time the Supreme Court declared, in 1982, that the class should not have been certified to include applicants, the time for filing EEOC charges was long past. Nothing in the record of *Falcon* indicated that any such person had filed a timely EEOC charge complaining of hiring discrimination. Absent the intervention of a non-filing applicant, the claims of the applicant class in *Falcon* necessarily expired.

342. A judgment entered in a properly certified class action binds all class members on the issues decided in the case. In Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984), the Court held that such a judgment: (1) bars the class members from bringing another class action against the defendant alleging a pattern or practice of discrimination during the relevant time period and (2) precludes the class members in any other litigation with the defendant from relitigating the question of whether the defendant had engaged in a pattern and practice of discrimination against the class during the relevant time period. *Id.* at 2794. The judgment does not, however, preclude individual claims of members of the class who can litigate their own cases of disparate treatment. Thus, in *Wheeler,* putative class members who satisfied the *Falcon* requirements could relitigate both their individual and class claims, including those class claims that were decided adversely by the district court.

III. A GUIDE FOR DETERMINING REPRESENTATIONAL ADEQUACY

Rule 23 requires a preliminary determination of whether a suit should proceed as a class action.[343] Class certification cannot insure that protection of class interests will continue throughout the litigation. Consequently, courts have generally recognized a continuing obligation to reevaluate class representation.[344] Scrutiny is necessary throughout the litigation to insure that absent class members will not be bound by the results of litigation in which their interests have not been protected. The process of protecting the class interests can be analyzed at two stages: certification and post-certification.

A. Representational Adequacy at the Certification Stage

When a party moves for class certification under Rule 23(c), the court determines whether the proposed class is sufficiently numerous and is manageable within one of the subdivision (b) categories. In addition, the court must make a preliminary determination as to whether the proposed representative is eligible to represent the class. The Rule 23(a)(2), (3), and (4) prerequisites should be treated as guideposts for making this initial determination.[345] These prerequisites encompass six distinct, practical considerations.

Initially, the court should consider whether there is any conflict between the interests of the representative and those of the class, or between the interests of different groups within the class.[346] Often this determination will be simple because the requested relief will be of the sort that all members would presumably desire. For example, back pay and preferential hiring rights would probably be welcomed by all unsuccessful job applicants.[347] Where there is a serious question as to whether many class members would share the litigation goals of the plaintiff, notice to the class may be the only way

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343. *See supra* note 156.

344. *See, e.g.*, Guerine v. J & W Inv., Inc., 544 F.2d 863, 864 (5th Cir. 1977); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 233 (N.D. Tex. 1980); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978).

345. *Falcon*, 457 U.S. at 157 n.13.

346. *Falcon* suggests that conflicts of interest between the representative and class is a problem to be dealt with in the context of the subdivision (a)(4) adequacy calculation and as such should be addressed after typicality under subdivision (a)(3) is found. But since a conflict identifiable at the certification stage will result in either a definition of the class quite different from that proposed by the plaintiff, or the outright refusal to certify, it is logical to inquire into whether such conflict exists before dealing with the conceptually less clear issue of typicality.

347. In *Sosna*, the Court noted that a conflict of interest would render the representative inadequate but found it "difficult to imagine why any person in the class appellant represents would have an interest in seeing [the Iowa durational residency statute for divorce] upheld." 419 U.S. at 403 n.13. In *Franks*, the Court found the representative to be adequate despite the mootness of the named plaintiffs' claim, in part because "[n]o questions are raised concerning the continued desire of any of these class members for the seniority relief presently in issue." 424 U.S. at 756.

to test for such a conflict of interest. Even sparse response to such notice may serve to confirm a court's suspicion that conflict exists. If the court remains convinced that a significant number of the members of the proposed class oppose the relief sought by plaintiff, the action should not be allowed to proceed without a redefinition of the class and a demonstration that the divergent interests will be protected in the litigation.[348]

The broader the scope of the class and the diversity of interests within the class, the greater the possibility that relief sought for some will conflict with the interests of others. For example, in a class of all minority employees, the grant of retroactive seniority to those barred from one job classification might create conflicts with the seniority rights of those already employed in that classification.[349] If one attorney seeks to represent the entire class, not even the presence of different representatives for each part of the class will solve the conflict. The potential for such intra-class conflicts must be examined carefully at the certification stage and if real conflict is likely, the class should be redefined or sub-classes created with separate representation.[350]

If no traditional conflicts of interest exist, the court must consider a second factor: whether the plaintiff has a legitimate claim to representative status in light of the commonality, typicality, and adequacy requirements of Rule 23(a). In addressing this concern, *Falcon* commands a comparison of the plaintiff's personal claim with the class claims. If the plaintiff's claim and the class claims are the same, then both the commonality and typicality requirements are satisfied.

Where different practices are attacked, some of which have not personally affected the plaintiff, and the plaintiff seeks class relief broader than that to which he or she would be individually entitled, the plaintiff must come forward with significant proof that a general policy of the defendant underlies all the practices challenged in the litigation. *Falcon* sets forth no explanation of what will constitute such proof. Nothing in the opinion suggests that the plaintiff must prove the validity of either the individual or class claim in order to establish typicality. Rather, what seems to be called for is proof that the practice the plaintiff complains of is representative of an institutional way of doing things that manifests itself in other practices attacked on behalf of the class. Thus, the *Falcon* Court suggested that subjective decision-making processes could constitute a sufficient link between hiring and promotion claims in an employment case to justify a class composed of employees and applicants.

If the purpose of the commonality and typicality guideposts is to gauge the named plaintiff's incentive to litigate the class claim, it is logical to evaluate the individual and class claims in that light. If the plaintiff's own

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348. *See generally* Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982).

349. The defendant in *Falcon* argued that just such a conflict existed in that case. *See supra* note 315.

350. *See* Rhode, *supra* note 348, at 1194-95, 1251-62.

claim would be benefited by proof of class-wide discrimination, he or she will presumably have an incentive to effectively litigate the class claim. In employment cases, for example, evidence of a class-wide pattern of discrimination is relevant proof that supports an individual's claim of intentional discrimination.[351] This approach is certainly consistent with Justice Stevens's contention that an individual claim of intentional discrimination, commonly called disparate treatment, is not typical of a class claim premised on a disproportionate impact theory.[352] Logically, an employer who has adopted a practice that inadvertently impacts more harshly on minority employees than others is not, for that reason, more likely to intentionally discriminate. On the other hand, an employer who intentionally discriminates against minority employees in job assignment is all the more likely to discriminate against the same racial group in hiring.[353]

But a determination of interrelatedness is not equivalent to a finding that a plaintiff has all the necessary incentives to press the class claims. The plaintiff's benefits from class-wide proof may be marginal in light of the added expenses, effort, and delay that litigation of class claims usually entails. Thus, courts should make certain that the representative is aware of the probable effects on his or her individual claim of class certification. This third factor of personal commitment is an intangible one. A representative's personal stake in his or her own claim or a sincere desire to serve as a private attorney general, may be adequate incentives.[354] At the least, however, the certification stage is the time for the representative to be warned of the costs and consequences of class representation.

There is never a guarantee that the representative's incentive to pursue the class interests will survive lengthy litigation. A close identity of individual and class claims does not guarantee sufficient incentive. Similarly, a wide divergence of interests does not necessarily mean that the class will be poorly protected. Certainly many across-the-board classes have been competently and vigorously protected by representatives with narrow or even moot claims.[355] Likewise, representatives with claims that were virtually synonymous

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351. In McDonald Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973), the Court stated that statistical evidence of the employer's employment policy and practice could support the plaintiff's hiring claim. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (once a prima facia discrimination case is established, statistical evidence of racially balanced work force is relevant to question of employer's motive).

352. *See supra* note 302.

353. *See, e.g.*, Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir. 1978); Chayes, *supra* note 261, at 38.

354. *See* Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-39, 1043 (1968) ("There is noting in our experience or in our understanding of human nature which shows that [ideologically motivated] plaintiffs will not be effective advocates.").

355. *See, e.g.*, Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir.), *cert. denied*, 459 U.S. 981 (1982); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Even critics of the across-the-board approach to certification admit that broad class claims have been vigorously prosecuted by those who could claim no personal stake in

with the class claim have, on occasion, badly served their classes.[356] The difficulty of predicting the survival of essential incentives at the certification stage should cause judges to consider a fourth factor: whether a substitute for traditional personal stake incentive exists.

One recognized substitute for the client's personal stake incentive is the motivation of the class attorney.[357] That incentive may be purely economic, as in "common fund" cases where the attorney's fee will be determined by his or her success on behalf of the class,[358] or as in civil rights cases where statutes provide for attorney's fee awards to the prevailing party.[359] Social and political incentives are also important. Organizations with social goals frequently employ attorneys for specific types of litigation, and ideologically motivated lawyers may litigate cases because they believe in the rightness of the goal, even without organizational support.[360] Our judicial system has always relied heavily on attorneys to represent class interests, and it makes little sense to ignore the attorney's motivation in making preliminary adequacy decisions. Such an inquiry is also supported by decisions such as *Sosna, Gerstein,* and *Geraghty.*

Along with the proper incentives, the representative team must have sufficient financial and personal resources to litigate the class claim.[361] The broader and more diverse the class, the more expensive and time consuming the action

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all aspects of the class case. *See Rutherglen, Notice, Scope and Preclusion, supra* note 309, at 39-42.

356. *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

357. *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); *supra* text accompanying notes 162-64.

358. *See, e.g.,* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (absence of statutory award for attorney's fees does not preclude same award when plaintiff successfully maintains suit that benefits class in same manner as himself); Note, *The Allocation of Attorney's Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971) (*Mills,* which broadened the concept of "benefit" as well as its context of application, introduced radical changes in traditional fee doctrines).

359. The Civil Rights Attorneys Fee Act of 1976, 42 U.S.C. § 1988 (1982), provides for the award of reasonable attorney's fees to prevailing parties, other than the United States, in most civil rights cases. In employment discrimination cases fees are available to prevailing parties under Title VII, 42 U.S.C. § 2000e-5(k) (1976), and in housing discrimination suits under 42 U.S.C. § 3612(c) (1976). Since the starting point for calculation of a reasonable fee is the amount of time expended on the case, *see* Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974), awards in class actions are likely to be significantly higher than in individual cases, *see* Laffey v. Northwest Airlines, Inc., 32 Fair Empl. Prac. Cas. (BNA) 770 (D.D.C. 1983) (award of $3.5 million in attorney's fees in Title VII class action), *rev'd and remanded,* 35 Empl. Prac. Dec. (CCH) ¶ 34,680 (D.C. Cir. 1984).

360. *See generally* Comment, *The New Public Interest Lawyers,* 79 YALE L.J. 1069 (1970) [hereinafter cited as Comment, *Public Interest Lawyers*].

361. *See, e.g.,* McGowan v. Falkner Concrete Pipe Co., 659 F.2d 554, 559-60 (5th Cir. 1981) (class certification proper device when plaintiffs cannot secure proper funding of their litigation); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 535 (W.D. La. 1976), *aff'd,* 577 F.2d 1132 (5th Cir. 1978) ("if a party seeking to represent a class is unwilling or unable financially to undertake at least some minimum degree of discovery, then that party should not be able to endanger the rights of absent parties").

will be. Thus, the representative seeking to certify a geographically broad and diverse class should expect a searching inquiry into a fifth factor: the manpower that can be devoted to the case and the available financial support.[362] A class action requiring large scale discovery, expert witnesses, or extensive travel by counsel should not be certified without assurances from the plaintiff, the attorney, or both, that they can afford the costs necessary to litigate the case fully.[363]

The competence of the attorney is the sixth factor, and it may be the hardest one to evaluate at the certification stage. An attorney who can show a successful track record in similar class actions surely establishes a prima facie case for competency to represent the class. But a court will have little basis for judging a non-expert attorney's competency except through the pleadings, pre-certification discovery, and the attorney's performance at the certification hearing. What should be required is a judicial recognition of those indicia of competence that are available, and an articulation of a rational basis for finding the attorney competent.[364] When an inexperienced attorney has taken on a complex case, it may be sensible to condition certification on the association of more experienced counsel[365] or to allow class-wide discovery to go forward and delay a certification order until more data is available with respect to counsel's ability to handle the litigation.[366]

Since the chief purpose of the Rule 23(a) prerequisites is to protect the class interest, it makes little sense to rule on the certification request without considering how the class as an entity will be affected by the ruling. Though not formally encompassed in Rule 23, the court should question whether the class, as defined by the pleadings, has anything to lose if it is certified. Most legal claims, by their nature, have a limited temporal existence. If the class claim is on its way to extinction and only one champion has stepped forward, the danger of the class being badly served by the representative team would seem to be of relatively little consequence. For example, where an employer has allegedly engaged in a practice in violation of Title VII and the practice has ceased, the statute of limitations on the class claim has begun to run. The named plaintiffs may be the only class members able

362. *See* Klein v. Henry S. Miller Residential Serv., Inc., 82 F.R.D. 6, 8-9 (N.D. Tex. 1978).

363. *See* cases cited *supra* notes 361-62; *see also In re* Mid-Atlantic Toyota, 93 F.R.D. 485 (D. Md. 1982) (adequate representation impossible when named plaintiffs have no financial interest because of legal fee agreement); Charal v. Andes, 81 F.R.D. 99 (E.D. Pa. 1979) (attorney cannot have unfettered discretion to prosecute at expense of representative's duty to supervise).

364. *See* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978).

365. *See, e.g.*, Jordan v. County of Los Angeles, 669 F.2d 1311, 1323 n.13 (9th Cir. 1982) (adequacy of counsel may be reviewed continually throughout the pendency of the action).

366. *See* Rogers v. United States Steel Corp., 508 F.2d 152, 161-62 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 951 (9th Cir. 1972); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41 (1967) (noting that it may not be practicable to decide whether class should be certified without extensive discovery).

to file a suit for compensatory relief.[367] The denial of certification in such a case will mean that the class can never have its day in court. If this is so, the court should assess the adequacy question in this light. Certification, even when the representative team appears marginal, would at least allow intervention by other class members who might bring in additional counsel to improve the representation.[368]

Even if the class claim is not on its way to extinction, individuals will be continually leaving the class as their personal claims for relief prescribe.[369] Filing the class action tolls the running of the statute of limitations on the claims for relief by all persons in the class.[370] An order denying certification causes the applicable limitation statute to begin to run again. Therefore, even if a group claim will not be eliminated permanently by a refusal to certify, the court must recognize the likelihood that some individuals in the putative class will in fact lose their opportunity for legal redress if the class is not certified. In addition, particularly when a continuing practice is challenged, putative class members will have an interest in terminating the practice as quickly as possible, an interest which will be prejudiced by denial of certification. Where the court recognizes a live case and controversy with respect to an absentee group, neither article III nor Rule 23 prevents it from preserving the class claim even though the representative might have become ineligible to initially seek certification. *Sosna, Gerstein,* and *Geraghty* teach us that much. The same approach should be adopted for the same reasons at the certification stage when it is determined that the plaintiff is ineligible to represent the entire class because of the limited nature of his or her individual claim.

If the interest of the class as an entity requires a new or additional representative party to step forward as a named litigant, the court should facilitate that process. The message of *Falcon* is not that class actions may not encompass different claims on behalf of different sub-classes. Rather, sub-classes with claims insufficiently interrelated to allow representation by a common plaintiff must each have a representative with a claim typical of the subclass. In *United Airlines, Inc. v. McDonald,*[371] the Supreme Court held that putative class members could intervene in an action even after final judgment, for the purpose of appealing the denial of class certification. Thus, there can be no Rule 23 obstacle to intervention of new class representatives

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367. *See supra* notes 340-41.

368. *See infra* text accompanying notes 371-73.

369. For example, in a salary discrimination case, the discriminatory practice may continue, but employees who have resigned or been discharged will only have a limited period within which to assert a claim for lost wages. In a Title VII case the applicable back pay period for this class will be determined by the date on which the plaintiff filed his EEOC charge. *See* Allen v. United States Steel Corp., 665 F.2d 689, 694-96 (5th Cir. 1982); Satterwhite v. City of Greenville, 578 F.2d 987, 997 (5th Cir. 1978) (en banc), *vacated on other grounds,* 445 U.S. 940 (1980).

370. *See* Crown, Cork & Seal Co., Inc. v. Parker, 103 S. Ct. 2392, 2396-97 (1983).

371. 432 U.S. 385 (1977).

at the certification stage. Before *Falcon,* when a class representative was found inadequate, a number of courts held the class open for an appropriate representative to come forward.[372] *Falcon* does not address this practice. Post-*Falcon* decisions have held that where a live class controversy exists, intervention should be allowed to protect the interests of the absent class members, to conserve judicial resources, and to avoid the risk of inconsistent adjudication.[373] These decisions are consistent with the Supreme Court's article III approach to class actions as well as with *Falcon's* emphasis on judicial economy.

Geraghty and *United Airlines* demonstrate that there are no constitutional or procedural barriers to intervention by members of a putative class in order to provide representation that complies with Rule 23(a) requirements.[374] In addition, such intervention also satisfies permissive intervention requirements under Rule 24(b), because the class intervenors necessarily have "a question of law or fact in common" with the claim made on behalf of the class.[375] Moreover, intervention does not unduly prejudice the rights of the existing parties. The rights of the original plaintiff are hardly prejudiced by an action which allows the class originally proposed to go forward. It is also unlikely that a defendant would suffer prejudice. Like the employer in *United Airlines,* the defendant will be "put on notice by the filing of the . . . complaint of the possibility of class-wide liability. . . ." [376]

The opportunity to intervene will mean little to the unrepresented class members, however, without notice that their potential claim is endangered by the lack of an appropriate class representative. Rule 23(d)(2) authorizes the district court to order notice to be given to allow potential class members to intervene in the action. The advisory committee assumed that discretionary notice under Rule 23(d)(2) could be used to "encourage interventions to improve the representation of the class."[377] Courts have required notice for the express purpose of attracting additional representatives.[378] Formal notice

372. *See* Ford v. United States Steel Corp., 638 F.2d 753, 761-62 (5th Cir. 1981); Armour v. City of Anniston, 622 F.2d 1226 (5th Cir. 1980); Goodman v. Schlesinger, 584 F.2d 1325, 1333 (4th Cir. 1978); Moss v. Lane Co., 471 F.2d 853, 855-56 (4th Cir. 1973); Cox v. Babcock & Wilcox, 471 F.2d 13, 15 (4th Cir. 1972).

373. *See* Hill v. Western Elec. Co., 672 F.2d 381, 385-87 (4th Cir.), *cert. denied,* 459 U.S. 981 (1982); Brown v. Eckerd Drugs, Inc., 564 F. Supp. 1440, 1448 (W.D.N.C. 1983); *infra* text accompanying notes notes 411-15.

374. *See* Ford v. United States Steel Corp., 638 F.2d 753 (5th Cir. 1981).

375. Rule 24(b) provides in part: "Upon timely application anyone may be permitted to intervene in an action: . . . when an applicants claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b).

376. *United Airlines,* 432 U.S. at 395.

377. 39 F.R.D. at 106.

378. *See* Sperry Rand Corp. v. Larson, 554 F.2d 868, 875-76 (8th Cir. 1977); Sanders v. John Nuveen & Co., 463 F.2d 1075, 1081-82 (7th Cir.), *cert. denied,* 409 U.S. 1009 (1972); Burvell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499-500 (E.D. Va. 1975); Gates v. Dalton, 67 F.R.D. 621, 633 (E.D.N.Y. 1975); *cf.* Smith v. Missouri Pacific R.R. Co., 19 Fed. R. Serv. 2d 1044, 1047 (W.D. La. 1975) (notice to unrepresented class of employees who could be affected by relief sought by plaintiffs' class).

under court supervision is preferable to haphazard solicitation of intervenors by the plaintiff or the plaintiff's attorney.[379] Pre-certification notice is also consistent with *Geraghty's* policy that a plaintiff without a personal stake in the merits of the class claim may represent that class at least to the extent of seeking certification. Much of the evidence suggests that class notices are often ignored or misunderstood.[380] A notice of imminent denial of certification with an explanation of its consequences to class members is one form of notice most likely to generate a response. Potential intervenors are more likely to come forward if they are assured, as they probably are in a case which runs afoul of *Falcon,* that an attorney already involved in the case stands ready to represent them.[381] Efficient or not, such notice may be the only avenue open to the court to protect absentee interests within the confines of Rule 23.

Finally, a problem with certification procedure highlighted by *Falcon* is the failure of many courts to articulate reasons for the designation of class status. In *Falcon,* for example, the trial court certified the class without a hearing or an explanation. Particularly where questions are raised concerning the representative nature of the plaintiff's claim, *Falcon* requires a judge to make specific findings regarding compliance with Rule 23. Specific findings are absolutely necessary for meaningful appellate review of the certification decision. Part of the court's obligation to protect the class is satisfied by careful articulation of the reasons for allowing the designation of class status.

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379. The ethical restraints on solicitation of class members are unclear. The Model Code provides:

> If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but should not seek, employment from those contacted for the purpose of obtaining their joinder.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(5) (1980). Courts have, on occasion, held that unauthorized communication by attorneys with potential class members to encourage their participation is improper. *See* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931-32 (7th Cir. 1972); Lewis v. Bloomsburg Mills Inc., 80 F.R.D. 109, 111 (D.S.C. 1978); Korn v. Franchard Corp., [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,845 (S.D.N.Y. 1970), *rev'd on other grounds,* 456 F.2d 1206 (2d Cir. 1972). The Supreme Court in *In re* Primus, 436 U.S. 412 (1978), held that solicitation of prospective litigants by a nonprofit organization that engaged in litigation as "a form of political expression" was protected by the first amendment. The Court noted, however, that it was "not presented . . . with a situation where the income of the lawyer who solicits the prospective litigant or who engages in the actual representation of the solicited client rises or falls with the outcome of the particular litigation." *Id.* at 436 n.30; *see also* Lewis v. Bloomsburg Mills, Inc., 80 F.R.D. 109, 111 (D.S.C. 1978) (distinguishing *Primus* in case where attorneys stood to benefit from broader class).

380. *See* Rhode, *supra* note 348, at 1235.

381. Unless there is an actual conflict of interests between those in the subclasses, there is no ethical or practical reason for requiring intervenors to retain separate counsel. *Falcon* requires denial of certification in situations where there are no real conflicts of interest—only lack of a named plaintiff whose claim is like that of a subgroup within the class. *Id.* at 1221-22 (advocating separate representation "once significant class cleavages became apparent").

B. Post-Certification Protection of the Class

Once the court grants certification, Rule 23(c) contemplates a continuing duty to monitor the proceedings and to reevaluate the representative team's performance as the litigation unfolds.[382] This duty is exercised most effectively through scrutiny of the plaintiff's discovery efforts, trial preparation, and litigation results. After trial, the Rule 23 guideposts are properly superceded by an inquiry into the actual adequacy of a representative team's accomplishments.

In preparation for trial, protection of class interests requires the effective use of discovery procedures to develop class-wide evidence, particularly the development of statistical proof to show class-wide injury.[383] Today, it is rare that a class action is proved simply by parading a string of witnesses before the court. Ordinarily it will be necessary to discover the defendant's explanation for the allegedly illegal practice and to prepare rebuttal.[384] For example, where an employer has allegedly discriminated in promotions, it would be impossible to protect the class interests without deposing the officials responsible for making promotion decisions during the relevant period.[385] At the end of discovery, and preferably as part of a formal pre-trial proceeding,[386] the court must evaluate the discovery efforts made on behalf of the class. If the court is convinced that the discovery efforts were inadequate, certification should be revoked or the class redefined and limited in scope to correspond to the scope of discovery.[387] Moreover, the defendant is entitled to know before trial that his or her case can safely be limited to rebuttal of the plaintiff's individual claim.

The class issues must be litigated at trial. Failure to establish a prima facie case for class-wide liability may result from the failure of counsel to prepare adequately or the failure to present available proof. When the judge concludes that the class claims were not vigorously litigated, the benefit of the doubt should go to the class, and the judge should revoke certification to spare absentee class members the res judicata effects of an adverse

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382. *See, e.g.*, Guerine v. J & W Inv., Inc., 544 F.2d 863, 864 (5th Cir. 1977); Cooper v. University of Tex., 482 F. Supp. 187, 193 (N.D. Tex. 1979), *aff'd*, 648 F.2d 1039 (5th Cir. 1981) (per curiam).

383. *See* Molthan v. Temple Univ., 83 F.R.D. 368, 374 n.2 (E.D. Pa. 1979) ("If plaintiffs are to shoulder their responsibility in prosecuting class members' claims, any statistical evidence proffered at trial should be the sort that can withstand rigorous analysis.").

384. *See* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 535 (W.D. La. 1976), *aff'd*, 377 F.2d 1132 (5th Cir. 1978).

385. *Id.*

386. Rule 16 provides for pretrial conferences in which the court can "[adopt] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties. . . ." FED. R. CIV. P. 16.

387. *See* Lamphere v. Brown Univ., 553 F.2d 714, 720 (1st Cir. 1977). At this stage in the proceeding, notice to class members to encourage additional representatives to intervene will delay the action and be potentially unfair to the defendant. Decertification, on the other hand, will not, as a practical matter, leave the class in a worse position because without evidence of class-wide violations, liability to the class cannot be established.

judgment.[388] "[T]he court must not hesitate to decertify a class in whole or in part if the plaintiff has failed to present at least minimal evidence, or has otherwise demonstrated that the representation of all or part of the class is less than adequate."[389]

Where a class is certified but denied relief at trial, the representative is obligated to prosecute a non-frivolous appeal of that decision,[390] irrespective of the outcome of the representative's personal claim. Having entered a final judgment, the court's means of enforcing this obligation are limited, but if no appeal is taken the class should be relieved of the res judicata effects of the adverse judgment.[391] Where certification has been denied, *Geraghty* allows the would-be representative to appeal the denial in all events. If the court has denied class status through an incorrect assessment of typicality, it may be difficult to convince an appellate court of this error without trial evidence concerning the class claims. In such a case, the appellate court can protect class interests by remanding with instructions to determine, by notice or otherwise, whether a proper representative will come forward to represent the class.[392] If the plaintiff chooses not to appeal but the judge believes that a live class claim exists, post-trial notification to the putative class members by the defendant may be made a condition of entry of final judgment in order to encourage intervention for purposes of appeal. Where a class claim has been decided and appealed, the appellate court has the obligation to evaluate the representative team's actual performance before allowing an adverse judgment to foreclose the rights of absent class members.[393]

The waste and injustice of post-trial class decertification for non-compliance with *Falcon* is illustrated by the tortured history of another Fifth Circuit case, *Vuyanich v. Republic National Bank.*[394] The litigation began in 1973 with the filing of separate Title VII actions by two individuals. Joan Vuyanich, who had been employed at the bank as a clerical (non-exempt) employee, alleged that she was discharged because of her race and sex. The other plaintiff, Ellen Johnson, was an unsuccessful applicant for a managerial-trainee (exempt) position. Both complaints alleged across-the-board race and

388. Grigsby v. Northern Miss. Medical Center, Inc., 586 F.2d 457, 461-62 (5th Cir. 1978); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 537-41 (W.D. La. 1976), *aff'd,* 577 F.2d 1132 (5th Cir. 1978); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 702 (W.D. La. 1976); *cf.* Bowen v. General Motors Corp., 542 F. Supp. 94, 100-01 (N.D. Ohio 1981) (judgment entered was binding on all class members because the plaintiff had been an adequate representative of the class and had vigorously litigated the class's claim).

389. Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 240 (N.D. Tex. 1980).

390. *See* Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973).

391. *Id.*

392. This was the procedure followed in *Satterwhite, see supra* note 292, and in Ford v. United States Steel Corp., 638 F.2d 753 (5th Cir. 1981).

393. *See* Grigsby v. Northern Miss. Medical Center, Inc., 586 F.2d 457 (5th Cir. 1978); Bowen v. General Motors Corp., 542 F. Supp. 94 (M.D. Ohio 1981).

394. 723 F.2d 1195 (5th Cir.), *petition for cert. filed,* 53 U.S.L.W. 3326 (U.S. Oct. 9, 1984) (No. 84-570).

sex discrimination by the bank with respect to hiring, recruitment, training, promotion, and job requirements. The cases were subsequently consolidated and a class was certified that consisted of all females and all blacks of either sex who had been employed or who had applied for employment during the relevant time period.[395] In 1979, after extensive discovery and further hearings, the court divided the class into five sub-classes based on the class members' sex, race, status (applicant or employee), and position (exempt or non-exempt).[396] Three class members were allowed to intervene as additional class and sub-class representatives.[397] Because of a potential conflict between the interests of two of the sub-classes, neither the original plaintiffs nor their attorneys were allowed to represent one of the sub-classes.[398] Consequently, the sub-class representative retained separate counsel. The liability phase of the trial lasted twenty-four days and involved over thirty-six witnesses, ten of whom were experts in the fields of economics, statistics, and computer science. The centerpieces of both plaintiffs' and defendants' cases were extensive, complex, statistical analyses. In deciding the case, the district judge rendered an exhaustive 170-page opinion in which he found discrimination against some of the sub-classes on some of the claims and dismissed other claims made in the action.[399] The court also reconsidered the class certification in light of the Rule 23 requirements. With respect to the adequacy of the plaintiffs as class representatives, the court explained that the focus should be on the plaintiffs' actual adequacy at trial rather than on predictive measures of adequacy and numerosity.[400] The court refused to decertify or modify the original class certification, finding that the sub-classes had been competently represented.[401]

On appeal, eleven years after the case began and without any finding that error was committed on the merits of the case, the Fifth Circuit, on the basis of *Falcon,* reversed because the named plaintiffs had been permitted

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395. Vuyanich v. Republic Nat'l Bank of Dallas, 78 F.R.D. 352, 354 (N.D. Tex. 1973).

396. The sub-classes were: black and female exempt employees; female non-exempt employees; black non-exempt employees; unsuccessful black applicants and female applicants for exempt positions; and unsuccessful black applicants for non-exempt positions. Vuyanich v. Republic Nat'l Bank of Dallas, 82 F.R.D. 420, 433-34 (N.D. Tex. 1979).

397. *Id.* at 436-40.

398. The district court found a potential conflict between black non-exempt employees and female non-exempt employees because, with respect to the claim of discrimination in promotion, blacks and females could be contending for the same limited number of positions. Vuyanich and her attorney, who represented the sub-class of black non-exempt employees, could not represent the female non-exempt employee sub-class. The court also noted the same potential conflict between black non-exempt applicants and the female non-exempt employees, which rendered Johnson and her attorney, who represented the black applicant sub-classes, not proper representatives of the female non-exempt employees. The intervenor who represented the female non-exempt sub-class was thus represented by separate counsel. *Id.* at 437-438.

399. *Vuyanich,* 505 F. Supp. 224 (N.D. Tex. 1980).

400. *Id.* at 240.

401. *Id.* at 241-42.

"to assert class claims that [were] neither common nor typical of their personal claims."[402] *Carpenter*[403] and *Richardson*[404] were distinguished as having specifically relied on the "general policy of discrimination"[405] language from *Falcon*.[406] The court seemingly ignored the fact that the district judge in *Vuyanich* had certified the broad class precisely because "[t]he wide variety of discriminatory practices testified to by [the plaintiffs and the plaintiff intervenors] reinforces the court's earlier determination that the essence of their claims was the presence of a racially and sexually discriminatory animus pervading the Bank's personnel practices"[407] and had subsequently found that some of those claims were true. Five members of the court of appeals who dissented from the denial of the rehearing en banc in *Vuyanich* noted that the class suit had tolled the statute of limitations for class members and that on remand "[r]epresentatives satisfying even the panel's stringent requirements would likely be found" and a new suit would start its legal course.[408] The end result is that class members, who were adequately protected at every stage of the litigation by vigorous class representatives and a conscientious trial judge,[409] have been denied relief to which they are entitled under Title VII. The defendant's victory on some of the class claims has been vacated and none of the class claims have finally been resolved, due to a hindsight determination that the commonality and typicality requirements of Rule 23 were not met. As the dissenters from the rehearing denial concluded, "[l]aw so administered sets litigants in a maze that cannot end with justice."[410]

The *Vuyanich* result was not mandated by *Falcon*. Although Justice Stevens suggested disapproval of hindsight class determinations, *Falcon* was a case in which the trial judge certified a broad class solely on the basis of conclusory pleadings and made no findings with respect to the plaintiff's compliance with Rule 23(a). Thus, it was easy to conclude that the judge had abused his discretion at the certification stage. Where, as in *Vuyanich*, a judge has made class certification findings demonstrating a careful effort to apply Rule 23 to the available facts, *Falcon* should not be read to require that absentee class members or defendants be stripped of a legitimate victory, simply because hindsight reveals that the plaintiff's claims and those of the class were not actually interrelated.

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402. *Vuyanich*, 723 F.2d 1195, 1199 (5th Cir. 1984).

403. *See supra* text accompanying notes 328-30.

404. *See supra* text accompanying notes 331-32.

405. *See supra* note 319 and accompanying text.

406. *Vuyanich*, 723 F.2d at 1199.

407. *Vuyanich*, 506 F. Supp. at 242.

408. 736 F.2d 160, 161 (5th Cir. 1984) (Rubin & Tate, JJ., dissenting from denial of rehearing en banc).

409. After the initial grant of class status in 1974, the certification was reconsidered on three separate occasions. *See* 505 F. Supp. 224 (N.D. Tex. 1980); 82 F.R.D. 420 (N.D. Tex. 1979); 78 F.R.D. 352 (N.D. Tex. 1973). At each of these stages the actual performance of the class representatives and their attorneys was considered. The court of appeals did not suggest that the class or any sub-class had in fact been inadequately represented.

410. *Vuyanich*, 736 F.2d at 163.

Another route out of the *Falcon* problem, where the named representative's claim is shown to be atypical of the class claims at trial, is to allow intervention of additional representatives from the class. In *Hill v. Western Electric Co.*,[411] suit was filed by present and former employees who alleged discrimination against blacks and females in hiring, job placement, and promotion. Relying upon across-the-board authority, the trial judge had certified a broad class, including all unsuccessful black and female applicants. Following trial, the court found discrimination against blacks and women in hiring, job placement, and promotions. Appropriate relief was ordered, including back pay and priority hiring preference for the applicant sub-class. On appeal the Fourth Circuit interpreted *East Texas* as foreclosing employee representation of an applicant sub-class and vacated the sub-class's judgment for lack of an adequate representative.[412] On remand, the plaintiff's counsel filed motions to intervene on behalf of three rejected applicants, and sought to amend the original complaint to allege that the intervenors were representatives of the applicant sub-class. These motions were denied, but the Fourth Circuit reversed on the second appeal, this time relying on *United Airlines*.[413] In addition, the court directed the trial judge to consider reinstating the original findings on behalf of the applicant sub-class if it found the intervenors to be proper representatives. According to the court, the original decree had not expired upon decertification if the defect in representation was only a "technical lack of identity of interest and injury between representative and class," as opposed to actual inadequacy of representation.[414] The court noted that is was "obvious" that the original representation had all the indicia of diligence and effectiveness, including success on the merits. Remand was justified only by the need to consider whether any unfairness to the defendant would result from reinstatement of the earlier judgment.[415]

Falcon demands technical compliance with Rule 23(a). It does not hold that such compliance cannot be achieved by post-trial intervention or that *United Airlines*-type intervention cannot have retroactive effect.[416] The Fifth

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411. 672 F.2d 381 (4th Cir.), *cert. denied*, 103 S. Ct. 318 (1982) [hereinafter cited as *Hill II*].

412. Hill v. Western Elec. Co., 596 F.2d 99, 101-102 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979) [hereinafter cited as *Hill I*].

413. *Hill II*, 672 F.2d at 386-87.

414. *Id.* at 389.

415. *Id.* at 391-92. It is unclear how courts should determine whether reinstatement of findings made after erroneous class certification unfairly prejudice the defendant. *See* Note, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling* General Telephone Co. v. Falcon *with* Hill v. Western Electric Co., 1983 DUKE L.J. 821, 832 (arguing that defendant must demonstrate that it defended inadequately as a result of improper certification in order to show prejudice).

416. Justice Powell dissented from the Court's denial of certiorari in *Hill II* on the ground that the decision should be vacated for reconsideration in light of *Falcon*. Western Elec. Co. v. Hill, 103 S. Ct. 318 (1982) (Powell, J., dissenting).

Circuit's holding in *Vuyanich* that the intervenor could not continue to represent the sub-classes is not to the contrary. That holding was not based on *Falcon,* but on the alleged failure of the intervenors to proceed "within the periphery" of the named plaintiffs' Equal Employment Opportunity Commission (EEOC) charges.[417] The fact, however, that such efforts may be necessary to protect a judgment, even though there is no doubt about the real adequacy of the class representatives' efforts, demonstrates the essential weakness of *Falcon. Falcon* implies that technically adequate representation is really important. Yet, if intervenors can revive class certification and class relief, *Falcon's* concerns are technicalities indeed. It is hoped that more careful evaluation of actual adequacy at the certification stage will make such painful circumventions of *Falcon's* crabbed philosophy unnecessary.

IV. Notice, Opt-out, and the Narrowing of Class Scope as Means of Assuring Adequacy of Representation

The pragmatic approach to the protection of class interests outlined above is premised on a belief that real adequacy of representation cannot reliably be determined at the certification stage. Other writers have argued, however, that by providing notice to class members, allowing them to opt out of the class, and narrowing the scope of the class so that the class claims mirror those of the named representative, certification can be a means of formally uniting the interests of absentees with those of their representatives.[418] Because these proposals are intended to protect the interests of defendants more than those of absentee class members, they miss the point of the adequacy inquiry.

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417. *Vuyanich,* 723 F.2d at 1201. In a Title VII class action, the claims made on behalf of the class must be "like or related" to issues raised in the plaintiff's EEOC charge of discrimination, and class members who have not filed their own EEOC charges may not expand the scope of the class action by intervening.

The Fifth Circuit's decision in *Vuyanich* that the intervening class members could not represent the sub-classes because their claims were outside the scope of the EEOC charges of the named plaintiffs is, however, inexplicable. The district court in *Vuyanich* had held on three occasions that the EEOC charges filed by the named plaintiffs were broad enough to cover all the allegations of both race and sex discrimination made on behalf of the classes. *See supra* note 409. Less than a year before the *Vuyanich* decision, the Fifth Circuit had rearticulated the "like or related" test as applied to class actions. In Fellows v. Universal Restaurants, 701 F.2d 447 (5th Cir. 1983), the court held that neither a class allegation in the EEOC charge, nor a class investigation by the EEOC, was a prerequisite to a class suit. All that was required was that the substance of the charge afford "a reasonable expectation that the EEOC's investigation could encompass not only Universal's alleged discrimination against Ms. Fellows, but also that against all female applicants and employees." *Id.* at 451. The court of appeals opinion in *Vuyanich,* while recognizing the application of the "reasonable expectation" test, does not even refer to the district courts' findings that *all* the class claims could be reasonably expected to grow out of the named plaintiffs' EEOC charges, much less explain why those findings were erroneous.

418. *See generally* Rutherglen, *Title VII Class Actions,* 47 U. Chi. L. Rev. 688 (1980) (suggests replacement of the presumption in favor of class certification); Note, *Class Actions,* supra note 144, at 432 (courts should give greater regard to the implications of the "opt out" provision).

Rule 23(c)(2) requires that notice be given to all members of a subdivision (b)(3) class action at the certification stage and that they be allowed to opt out of the class by so advising the court.[419] No such notice or mandatory opt-out provision applies to either subdivision (b)(1) or (b)(2) class actions.[420] The argument that notice and the option to exclude oneself from the class should be provided in all class actions rests on the belief that those who are to be bound by the results of the litigation should have the freedom to choose between passive acquiescence in the representation, active participation by intervention, and opting out to maintain a separate action.[421] Underlying this argument is the philosophy that one who chooses one's own advocate is necessarily better represented.

In most types of institutional reform litigation, as a matter of fairness, class members ought to be informed early in the proceeding of litigation which may impact on their lives. Certification-stage notice aids in identifying intra-class conflicts and is necessary to protect the interests of absentees when certification is denied.[422] Notice at certification does not, however, materially facilitate the protection of absentees where a class is certified. First, notice this early in the litigation is unlikely to provide sufficient information about the case to allow individual class members to make rational decisions concerning their best interests. The requests for relief on behalf of the class will typically be broad and unspecific. The kinds of detailed remedial measures likely to provoke intra-class conflicts will not ordinarily be formulated until much later in the litigation—either at settlement or in the remedial phase of trial.[423] Nor is it possible in certification-stage notice to predict the performance of the representatives other than to describe their expressed desire to certify the class. Therefore, notice at this early stage in most cases provides the class member with only the broad outlines of relief to be requested and with necessarily incomplete information about the representatives and their litigation plans. Even if the notice is formulated to provide adequate information about the action, the proponents of this approach assume far too much about the ability of class members to make use of the information. Particularly where the educational background of

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419. Rule 23(c)(2) provides that:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23(c)(2).

420. Rule 23(d)(2) allows the court in its discretion to order that notice be given to class members "at any stage in the action." FED. R. CIV. P. 23(d)(2).

421. *See* Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 26-27.

422. *See supra* text accompanying notes 371-76.

423. *See* Rhode, *supra* note 348, at 1189.

the class members is limited, comprehension of the notice may be strikingly low.[424] The more complex the case, the more complicated the notice will be, making meaningful analysis more difficult for the average class member. Without a practical explanation of how a class member will benefit or be hurt by the suit, the class member will probably do nothing.[425] Notice in this situation may have the beneficial effect of providing some information to class members and of creating a communication link between the representative team and the class.[426] Notice, however, can hardly enable individuals to make the kind of informed choice among options that its proponents suggest. In contrast, notice of a proposed denial of certification will achieve its purpose if it provokes response from any member of the class or sub-class involved.

A more fundamental problem with the use of certification-stage notice to establish representational adequacy is the suggestion that a class member who receives notice and passively acquiesces in the action in some way commits himself or herself to the representative team and accepts the binding effect of the litigation regardless of the representative's performance.[427] Neither Rule 23 nor the due process clause allows such an anomolous result. A class member who has elected to remain in the class has not waived the right at a later stage to object to the actions of the class representatives or to seek to be relieved from a judgment or settlement of the class claim.[428] Thus, certification-stage notice may have beneficial uses, but it cannot, in most cases, actually serve to protect the class or relieve the court of the obligation to determine whether the representative team should be allowed to pursue the action on behalf of a class.

Nor can the opportunity to opt out of the class solve the problem of representational adequacy in the majority of class actions. The notion of the freedom not to participate has an appealing libertarian ring. Yet, the feasibility of allowing that option is highly questionable in the exact circumstances where its proponents argue that freedom to opt out is most important. In most institutional reform litigation, opting out is meaningless

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424. *Id.* at 1235 (reporting severe communication problems even in lawsuits involving few educationally disadvantaged class members).

425. The advisory committee that drafted Rule 23 did not expect certification-stage notice to elicit wide response. "As . . . the committee saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see to the effect that a non response means inclusion rather than exclusion." Statement of Benjamin Kaplan, Reporter to the Advisory Committee, *quoted in* Frankel, *Amended Rule 23 from a Judges' Point of View,* 32 ANTITRUST L.J. 295, 299 (1966). That expectation has been borne out by experience. *See* Rhode, *supra* note 348, at 1233 (reporting low response rate to notice even in cases affording strong incentive for response).

426. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981); *see also* Note, *Conflicts of Interest and Protection of Absent Class Members,* 91 YALE L.J. 590, 603-14 (1982) (advocating mandatory communication between class counsel and proposed class).

427. *See* Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 15 ("Failure to opt out after having received notice at least approximates actual consent to representation in the class action.").

428. *See supra* text accompanying notes 390-91.

because the individual who chooses to leave the class is benefited or hurt by the injunctive relief in exactly the same way, regardless of whether or not the individual is legally bound by the results.[429] Only where the relief is purely compensatory, such as with monetary damages, will the option to leave the class be meaningful. It is exactly this type of case where Rule 23 mandates that class members be given the option. Professor George Rutherglen has suggested that actions in which both injunctive and compensatory relief are sought should be certified as hybrid class actions and that class members should be allowed to opt out of claims for compensatory relief, while remaining bound by the disposition of claims for class-wide injunctive relief.[430] The utility of this approach is not apparent. In most class actions, the class's entitlement to both kinds of relief hinges on the same factual and legal issues. For example, a common type of employment discrimination case involves an attack on a seniority system that minority employees allege perpetuated past discrimination by locking them into lower paying departments or lines of promotion.[431] Plaintiffs generally seek both a re-structuring of the seniority system and back pay for the class as relief. But the class's entitlement to any relief depends upon the court's determination that the seniority system is not bona fide under Title VII.[432] In such a situation it is hard to imagine how hybrid certification would work. Class members who opted out for back pay purposes before the class claim for injunctive relief was lost would theoretically be allowed to attack the seniority system in a separate proceeding while being bound as Rule (b)(2) class members by a finding that the system was bona fide. This would subject the employer to potentially inconsistent adjudication regarding the legality of its seniority system. On the other hand, if the court found the system illegal in the class action, it makes no sense to require class members who opted out to relitigate the merits of the claim against the employer to establish their entitlement to back pay. The employer has had its day in court on the merits of the claim.[433] As a practical matter, of course, the determination of the class claim will foreclose individual actions by those who opted out whether or not they were technically bound by the prior decision.[434] Only where the representative fails to seek a type of relief to which class

429. *See generally* Rhodes, *supra* note 348, at 1195-97.

430. Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 30-32.

431. East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), and its companion decision, Teamsters v. United States, 431 U.S. 324 (1977), were cases of this sort. *See supra* notes 281, 287.

432. *See supra* note 287.

433. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (approving offensive use of collateral estoppel).

434. It is difficult to imagine an individual employee or the employee's attorney being willing to invest the resources necessary to relitigate a complex, difficult claim after the identical claim has been tried and lost. On the other hand, if the employer has lost the class's claim, even if not collaterally estopped from relitigation of the validity of the seniority system, he or she will face the stare decisis effect of the prior determination and will seek to limit the subsequent proceedings to issues of quantum.

members would otherwise be entitled does the resolution of the merits of the class claim not preclude subsequent action by class members on that cause of action.[435] Thus, allowing members to opt out of Rule 23(b)(2) class actions will not improve representation by providing for more individual choice of the representative team.

Finally, it is argued that the class cannot be adequately represented by a plaintiff unless the individual and class claims coincide. In *Falcon,* the Supreme Court treated the commonality and typicality requirements of Rule 23(a) as hurdles to be cleared before the court can address real adequacy of representation.[436] On the other hand, the proponents of requiring identity between individual and class claims contend that such a rule is necessary to establish adequacy itself because, lacking such identity, the named plaintiff will not have an incentive to pursue the class claim.[437] This theory, however, is not supported by experience. The most glaring examples of abandonment of class interests by their representatives occur in cases which would have easily passed the *Falcon* test—those where the class and individual claims were in fact identical.[438] In contrast, innumerable examples exist of the interests of across-the-board classes being vigorously protected by individuals with very narrow personal claims.[439]

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435. *See* Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979). Professor Rutherglen has argued that implicit in *Johnson* is a holding that all class members must receive notice in any Title VII class action seeking back pay. *See* Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 31. *Johnson* does not go that far. In *Johnson,* the class representatives in the prior case never sought back pay for the class. The Fifth Circuit merely held in the ~~second proceeding~~ that, ~~absent~~ notice which would have allowed them to intervene for purposes of requesting back pay, class members could not be precluded from filing separate suits for monetary relief. *See also* Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978) (prison inmates personal suit not limited by prior successful class action). Neither the Fifth Circuit, nor any other court has held that where relief *is* sought in a Rule 23(b)(2) class action, class members will still be allowed to litigate their individual claims separately unless they have received notice. In that situation, class members will only be allowed to pursue their own claims if they have been inadequately represented in the class action. Certification-stage notice in such a case will not insulate the employer from subsequent litigation. *See* Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973).

436. *Falcon,* 457 U.S. at 157 n.13.

437. *See* Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 36-38 ("subtle attenuation of several interests which . . . erode the named plaintiffs' incentive to pursue the interests of the class aggressively").

438. *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Airline Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc., 490 F.2d 636 (4th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

439. *See, e.g., Hill II,* 672 F.2d 381 (4th Cir.), *cert. denied,* 103 S. Ct. 318 (1982); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1978), *cert. denied,* 421 U.S. 1011 (1979); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). While noting that inadequate representation in the form of "attenuation of shared interests between the named plaintiff and the class is . . . difficult to define and detect," Professor Rutherglen has not provided a single example of a broad class actually being abandoned or poorly served by a plaintiff with a narrow, atypical claim. Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 38. His example of a case where the class interest was compromised, Airline Stewards

A more basic difficulty with the identity of claim argument is that it ignores the reality of modern class litigation. The named plaintiff's personal claim rarely supplies the incentive for litigation of the class claims no matter how closely they coincide.[440] If anything, the opposite is true. The desire of the representative team to serve as "private attorney generals" transcends the named plaintiff's quest for individual relief, particularly in institutional reform litigation.[441] In cases in which personal economic concerns are least likely to provide the motivation for filing the class action, it strains logic to insist that identity of individual and class claims is a sort of litmus test for adequacy. The identity of claim theory also blandly assumes that individuals omitted from the class due to the lack of a proper representative are better off than if they had remained in the class. As noted previously, this is frequently not the case.[442] The chief beneficiaries of the identity of claim theory are corporate and institutional defendants, not putative class members.

Certainly the relationship between individual and class claims is a factor for consideration in determining adequacy of representation at the certification stage. *Falcon* is, after all, a fact of life. But for the reasons discussed above, that relationship cannot be solely determinative of real representational adequacy. That relationship is only one of several considerations to be balanced in the calculation. Neither class notice, the right to opt out, nor the narrowing of class scope relieves the courts from ultimately assessing the ability of the representative team to protect the class. That none of the considerations discussed above provides a solution to the problem only emphasizes the importance of the trial courts' assessment of real adequacy.

CONCLUSION

The history of class litigation demonstrates that the only meaningful method for deciding whether a given individual should be allowed to represent a class is to scrutinize the actual ability and willingness of the plaintiff and the plaintiff's attorney to protect the interests of the absent class members in the litigation. In modern and complex litigation no inherent connection exists between those qualities that make the representative team adequate for this task and the degree of congruity of the named party's individual claim and the class claim. The ultimate question that must be answered before

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& Stewardesses Ass'n Local 550 v. American Airlines, Inc., 490 F.2d 636 (4th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), was a case which named individual plaintiffs' claim were identical to those of the class. There was, however, a "straightforward conflict of interest" between subgroups within the class. Rutherglen, *Notice, Scope and Preclusion, supra* note 309, at 42.

440. *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); *supra* note 162.

441. *See generally* Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1449 (1981) (discussing role of public interest lawyers); Comment, *Public Interest Lawyers, supra* note 360, at 1072 (presenting a survey of the clients and activities of public interest lawyers.

442. *See supra* text accompanying notes 339-40, 368-69.

absentees are bound by a judgment or settlement is whether they have been adequately represented. Only the most tentative answer to this question can be given at the certification stage of class litigation. At that stage, the similarities, or lack thereof, between the personal claim of the representative and the class claims is only one of several factors to be considered.

Because real adequacy of representation is determined only as the litigation progresses, it is unwise to establish arbitrary and rigid tests for adequacy at the certification stage. Since the protection of class members' interests is the principal reason why any inquiry is made into adequacy of representation, the actual interest of absentees must be considered at certification, at trial, and on appeal. There is no principled way for courts to escape the task of monitoring the class representative's performance throughout the litigation, and there should be no easy substitute for the task which can be invoked at the certification stage to relieve courts and attorneys of their obligations.